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# From independent lawyer groups to civic opposition: The case of China's New Citizen Movement

Eva Pils\*

**Abstract:** *Independent Chinese lawyer and human rights defender groups pose challenges to the Chinese Party-State system. Drawing on the example of the 'New Citizen Movement,' this article argues that human rights lawyers have moved from proposing reform to demanding change of and putting up resistance. As the legal-political environment deteriorates under the current Xi Jinping leadership, their persistence is all the more significant. Their emergence and experience support an understanding of human rights as a social practice less dependent on legal authority than some mainstream accounts suggest.*

## I. Introduction

When, in January 2014, the legal scholar and veteran human rights defender Xu Zhiyong was sentenced to some four years in prison for a public order crime, supporters greeted the news with a mixture of dismay and relief. There was dismay, because Xu's conviction testified to continued political persecution of innocent and patriotic human rights defenders in China. Yet there was also some relief because, considering Xu's prominent role in the New Citizen Movement (*xin gongmin yundong* 新公民运动), the charge against him could have been more serious, and the sentence longer.<sup>1</sup> Moreover, Xu himself, an articulate, sophisticated and determined forty-year-old former academic, community organiser and activist, had long expected to be imprisoned; he was prepared to accept this as a consequence (however unjust) of his work.<sup>2</sup> As detailed later, he was also able to continue his vocal advocacy from jail by releasing a video-recorded statement from pre-trial detention and publishing the statement he prepared for his trial; and the movement he had co-initiated inspired the creation of a dissident newsletter in support of the movement.

The New Citizen Movement is one of the most prominent examples of civic legal-political advocacy in the shadows of China's authoritarian system to date. It is the Chinese 'Arab Spring' and 'Occupy' that never – quite – happened. Attracting no more than thousands of participants before the inevitable, swift and sweeping government clampdown, it was likely noticed by far more people than dared to participate. Its rise and repression is emblematic not only of the respective strengths of the Party-State and its people, but also of a shift in China's civil society development, occurring at a time in contemporary history when rights advocacy still – just still – met with limited toleration from the government.

Accordingly, this article aims to give an account of the Movement and similar initiatives, of their precursors and their prospects, and the context of legal-political human rights advocacy in which they arise. It will be seen that in historical perspective, the groups and initiatives

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\*Reader in Transnational Law, King's College London, Dickson Poon School of Law; non-resident senior research fellow, NYU [US-Asia Law Institute](#).

<sup>11</sup> Didi Tang, 'China hits activists with common-crime charges,' *Associated Press*, 27 May 2014, <http://bigstory.ap.org/article/china-hits-activists-common-crime-charges>. Hermann Aubié & Xinhong Wang (2016), '(Un)Doing Constitutionalism: The Cases of Liu Xiaobo and Xu Zhiyong,' *Asian Studies Review*, 40:3, 377-393.

<sup>2</sup> Yaxue Cao, 'Who is Xu Zhiyong? Interview with Dr. Teng Biao,' parts 1 (10 April 2014) and 2 (13 April 2014), *ChinaChange*, <https://chinachange.org/2014/04/10/who-is-xu-zhiyong/>.

discussed here are able to organize more easily and to engage in more vocal political rights advocacy than some ten years ago, when professional rights defence emerged as a socio-political phenomenon in China. The spontaneity and fluidity of their organizing strategies and methods of communication has not only helped them overcome certain obstacles commonly found in highly repressive systems. Their organizational openness has also allowed them to strengthen their identities as citizens, understood in an overtly political, liberal and democratic sense.

Reflecting global changes in legal-political advocacy, these initiatives are significant for Chinese and transnational civil society, whether or not they succeed in the shorter term. As the persecution of the New Citizen and wider human rights lawyer movement, and the public branding of rights lawyers as public enemy figures toward the end of the research period illustrated,<sup>3</sup> their experience helps explain how law can drive the defence of human rights and how legal advocacy can evolve into political resistance. These insights are all the more important at a time when a ‘new authoritarianism’ and ‘democratic recession’ appear to take hold in more and more political communities around the world.<sup>4</sup>

Discussion in the following first addresses the Movement’s background in independent legal-political advocacy (part II), as well as advocacy NGOs and independent organization amongst human rights lawyers (part III). Understanding the New Citizen Movement’s rise and repression between 2012 and 2014, other novel forms of civic organizing in China, and the political implications of these initiatives (part IV) is also essential to understanding the subsequent stepping up of pressure, exemplified by even harsher attempts to destroy and vilify civic lawyer advocacy from 2015 onward (part V). The discussion here draws, *inter alia*, on loosely structured conversations, in person and via the social media, with lawyers who self-define as ‘rights defence lawyers,’ ‘human rights lawyers,’ or la human rights defenders working with lawyers, and on observation of their gatherings and discussions between October 2010 and July 2017.<sup>5</sup> It adopts an interpretive and value-based approach, rooted in an understanding of

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<sup>3</sup> The lawyers who were interlocutors for this project include many of those targeted in the so-called ‘7-09’ crackdown on lawyers (discussed below).

<sup>4</sup> Alexander Cooley, ‘Authoritarianism Goes Global: Countering Democratic Norms’ (2015) 26 *Journal of Democracy*, 49-63, available at <http://www.journalofdemocracy.org/article/authoritarianism-goes-global-countering-democratic-norms>; Larry Diamond, ‘Facing up to the Democratic Recession’ (2015) 26 *Journal of Democracy*, 141-155, available at <http://www.journalofdemocracy.org/article/facing-democratic-recession>; critically: Steven Levitsky and Lucan Way, ‘The Myth of Democratic Recession’ (2015) 26 *Journal of Democracy*, 45-58, available at <<http://www.journalofdemocracy.org/sites/default/files/Levitsky-26-1.pdf>. See also Varol, Ozan O., ‘Stealth Authoritarianism,’ (April 24, 2014). *Iowa Law Review*, Vol. 100, 2015, available at <http://ssrn.com/abstract=2428965>.

<sup>5</sup> The author conducted audio-recorded conversations in person with about eighty rights lawyers and twenty non-lawyer rights defenders between October 2010 and April 2016, and communicated with some of the interlocutors beyond this point via social media. The interlocutors were chosen mainly from a small group of some one to three hundred legal professionals and human rights advocates. Some ninety percent of these conversations were conducted in mainland China; and of these, some ninety percent were conducted in urban and semi-public settings such as coffee-shops and public parks. Some other conversations were held in Hong Kong and other places outside China; and some in non-urban settings such as in the context of a lawyer workshop retreat. All quoted passages have been anonymised using standard social science techniques and bearing in mind the fact that the interlocutors are at high risk of government abuses. I conducted recorded conversations with about eighty rights lawyers and about forty non-lawyer rights defenders between October 2010 and July 2017. Of these interlocutors, as of August 2017, some nine lawyers and four non-lawyers have been criminally convicted for their advocacy. Some twenty-two have suffered detention without trial, including forced disappearances; and well over half have reported suffering physical violence, including torture.

law and human rights as separate but related social practices underpinned by political-moral values.<sup>6</sup>

## II Political rights advocacy as a choice produced by institutional dysfunction

Forceful legal advocacy is a relatively recent phenomenon in the history of the PRC. *Weiquan* 维权 lawyers or, as they now more often call themselves, human rights (*renquan* 人权) lawyers emerged in the late 1990s, made possible by the legal reforms of the 1980s and 1990s.<sup>7</sup> Their emergence might be regarded as a further and possibly unintended consequence of the Party-State's attempts to seek legitimacy through lawful administration and protection of people's legal rights and interests, and until about 2004, rights defence (*weiquan*) was officially largely tolerated and achieved some, however limited, successes such as the revocation of a State Council Regulation in the wake of the now-famous Sun Zhigang Incident,<sup>8</sup> a case closely related to the person of Xu Zhiyong and to the emergence of the New Citizen Movement discussed in this article:

Sun Zhigang had died in custody, a young internal migrant beaten to death by inmates and prison guards, in 2003. He had been held under a special administrative detention system created for those internal (often: rural-urban) migrants who were found without the required documents showing they had a right to be in the city. Abuses of the system were rife; they included ransom-taking from, as well as violence in custody against these *sans-papiers*. Following the death of Sun Zhigang, liberal scholars including three young PhD graduates, Teng Biao, Yu Jiang and Xu Zhiyong, argued that it followed from Article 37 in conjunction with sections 8 and 9 of the Legislation Law that the administrative regulation that allowed Sun's detention was unlawful (unconstitutional) since these provisions require that the deprivation of liberty be based on NPC law and premised on a judicial or procuratorial decision.<sup>9</sup> Their argument was based in the broader principle that restrictions of the general right to liberty of the person must themselves be lawful, and that mere say-so by power-holders is not enough.

In their action following the Sun Zhigang Incident, they were persuasive and, within limits, successful in so arguing: the detention system in question was officially abolished thanks to their advocacy efforts, which had been supported by other scholars, by the popular press, and

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<sup>6</sup> In legal theory, interpretivism was developed by Dworkin (1986). Ronald Dworkin, Ronald, *Law's Empire*, Harvard University Press, Cambridge, Mass., 1986. For an interpretive account of the social practice of human rights, see Isabel Trujillo and Francesco Viola *What Human Rights Are Not* (Nova Science Publishers 2014), xii.

<sup>7</sup> Cullen, Richard and Fu Hualing, 'Weiwan (Rights Protection) Lawyering in an Authoritarian State: Building a Culture of Public-Interest Lawyering,' *The China Journal*, No. 59 (Jan., 2008), pp. 111-127 at p.116; Teng Biao, 'What is Rights Defence', in Stacy Mosher and Patrick Poon (editors) *A Sword and a Shield: China's Human Rights Lawyers* (China Human Rights Lawyers Concern Group: Hong Kong, 2009).

<sup>8</sup> Hand, Keith, 'Using Law for a Righteous Purpose: The Sun Zhigang Incident and Evolving Forms of Citizen Action in the People's Republic of China,' 45 *The Columbia Journal of Transnational Law* (2006) 138, at <http://librarysource.uchastings.edu/repository/Hand/45ColumJTransnatlL114.pdf>.

<sup>9</sup> For a discussion of the arguments challenging the constitutionality of the now-abolished Custody and Repatriation system, see Keith Hand, 'Using Law for a Righteous Purpose: The Sun Zhigang Incident and Evolving Forms of Citizen Action in the People's Republic of China' (2006) 45 *The Columbia Journal of Transnational Law*, 138, available at <<http://librarysource.uchastings.edu/repository/Hand/45ColumJTransnatlL114.pdf>> [last accessed 10 November 2016]. The law cited is 中华人民共和国立法法 [PRC Law on Legislation], promulgated by the Standing Committee of National People's Congress, 15 March 2000, effective 1 July 2000, available at <[http://www.gov.cn/test/2005-08/13/content\\_22423.htm](http://www.gov.cn/test/2005-08/13/content_22423.htm)> [last accessed 10 November 2016] ['Hand'].

expressions of support from the public. While according to an account by one of the initiators, the human rights scholar Teng Biao, some abuses the system gave rise to persisted,<sup>10</sup> the incident was nevertheless an instance of ‘bringing the Constitution alive (*jihuo xianfa* 激活宪法)’ in the inclement conditions of the existing legal system.<sup>11</sup> At the time, this success achieved by the ‘three doctors of law’ was celebrated by fellow academics and in the public media; and Xu and his colleagues seemed set to play a prominent, yet relatively safe and predictable, role in China’s development toward a more liberal system.

As the Sun Zhigang Incident illustrated, the starting point of a human rights lawyer’s advocacy is often their work on an individual case of injustice, and justice, or redress, is sought through institutionalised mechanisms. In most such cases, lawyers start by using court litigation; but their ability to promote the protection of constitutional rights or human rights under public international law is limited.

To be sure, the 1982 Constitution (last revised in 2004) articulates liberal principles in Chapter 2, and authoritarian (Leninist and Maoist) principles in Chapters 1 and 3.<sup>12</sup> Chapter 2 of the Constitution safeguards the right to equality before the law, the right to vote, freedom of speech, freedom of assembly and association, freedom of religion, freedom and security of the person, freedom from insult, freedom from violation of the home, and the privacy of correspondence, as well as certain socio-economic rights.<sup>13</sup> The Constitution also gestures at a principle of genuine rule of law. Its Article 5 states that

‘All state organs, the armed forces, all political parties and public organizations and all enterprises and institutions must abide by the Constitution and the law. All acts in violation of the Constitution and the law must be investigated. No individuals or organizations are above the Constitution or the law.’

An amendment in 2004 added the phrase ‘the State respects and preserves human rights’ to Article 33.<sup>14</sup> Further, China is a State party to numerous human rights treaties. It has signed albeit not yet ratified the International Covenant on Civil and Political Rights (ICCPR),<sup>15</sup> and it has signed and ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>16</sup> the Convention on the Elimination of All Forms of Discrimination against Women

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<sup>10</sup> *Ibid.*

<sup>11</sup> Teng Biao, ‘The Sun Zhigang Incident and the Future of Constitutionalism: Does the Chinese Constitution Have a Future?’ (30 December 2013) CRJ Occasional Paper <<https://www.law.cuhk.edu.hk/en/research/crj/download/papers/2013-tb-szg-constitutionalism.pdf>> [last accessed 27 October 2016].

<sup>12</sup> E.g. Teng Biao, ‘Rights Defence, Microblogs, and the Surrounding Gaze: The Rights Defence Movement Online and Offline,’ in *Locating Civil Society: Communities Defending Basic Liberties*, Special Issue of *China Perspectives* 2012 / no.3.

<sup>13</sup> Albert Chen, *An Introduction to the Legal System of the PRC* (4th edition) *An Introduction to the Legal System of the People's Republic of China* (4<sup>th</sup> edition, 2011), chapter 4.

<sup>14</sup> The Constitution also lists duties of citizens and also stipulates in its Article 51 that the exercise of constitutional rights may not ‘infringe upon the interests of the state, of society or of the collective, or upon the lawful freedoms and rights of other citizens.’

<sup>15</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

<sup>16</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).



(CEDAW),<sup>17</sup> the Convention on the Elimination of All Forms of Racial Discrimination (CERD),<sup>18</sup> the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),<sup>19</sup> the Convention on the Rights of the Child (CRC)<sup>20</sup> and the Convention on the Rights of Persons with Disabilities (CRPD).<sup>21</sup> (It has not acceded to the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families<sup>22</sup> and the International Convention for the Protection of All Persons from Enforced Disappearance.<sup>23</sup>)

However, there are few institutional mechanisms for safeguarding the standards and principles these norms articulate, and their effectiveness is limited. At the international level, China has opted out of the individual complaints procedures of the UN institutions. At the domestic level, as Ahl has pointed out, courts apply treaty provisions only ‘on the basis of statutory reference provisions or judicial interpretations commanding application of an international standard,’<sup>24</sup> not available in human rights norms. The judiciary has so far also been unable to overcome bureaucratic obstacles to giving domestic constitutional human rights norms effect;<sup>25</sup> and even its ability to review norms in violation of ordinary NPC laws is limited. The mechanism used in the wake of the Sun Zhigang Incident, on the other hand, is lacking in transparency and does not adopt a forensic format, making it difficult to achieve or track success.<sup>26</sup> As the Sun Zhigang Incident also showed, moreover, the system is riddled with systematic abuses especially in the context of administrative and criminal detention and the wider criminal justice system. Many of these abuses violate not only constitutional rights but also written laws that courts do have a mandate to apply and uphold; but for various institutional reasons centred in what Li has termed ‘judicial dependence,’<sup>27</sup> the courts are unable to address systematic abuses, such as police torture, effectively.

In such conditions of systemic disregard for the law, even a lawyer’s insistence on taking the written, black-letter rules of the law -- let alone the more abstract rights and principles found in constitutional rights provisions -- seriously can become an act of subversion of the system as it

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<sup>17</sup> Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

<sup>18</sup> Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD).

<sup>19</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) 1465 UNTS 85.

<sup>20</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 3 (CRC).

<sup>21</sup> Convention on the Rights of Persons with Disabilities (adopted 30 March 2007, entered into force 3 May 2008, CRPD).

<sup>22</sup> Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 (CPRM).

<sup>23</sup> International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3.

<sup>24</sup> Bjoern Ahl, ‘Chinese Law and International Treaties’ (2009) 39 *Hong Kong Law Journal* 751, available at <http://www.cesl.edu.cn/eng/upload/201106214048086.pdf>; Congyan Cai, ‘International law in Chinese courts’, *American Journal of International Law*, 110:2 (2016) 269, at 282 f. For an overview of treaties signed and ratified see Bayefsky, ‘The United Nations Human Rights Treaties – China,’ as of 20 September 2011 at <http://www.bayefsky.com/bycategory.php/state/36>.

<sup>25</sup> This is discussed in the following section.

<sup>26</sup> Hand, *supra*. For example, ordinary, private users of this system are not even entitled to a reply to their suggestion letters sent to the relevant NPC Standing Committee working group.

<sup>27</sup> Li Ling, ‘The Chinese Communist Party and People’s Courts: Judicial Dependence in China’ (2015), available at <<http://ssrn.com/abstract=2551014>>

actually, ordinarily works. Examples are furnished, not only by high-profile cases such as that of Sun Zhigang. Many more everyday examples include the simple act of challenging a defendant's forced confession by demanding its exclusion as evidence supporting a conviction,<sup>28</sup> and attempts to get an application for civil or administrative court litigation accepted by a judge reluctant to handle the case for fear of being disciplined or retaliated against. Whereas at one level the system as represented in some of its written rules envisages and invites challenges to public power, it is at another level highly intransigent to it.<sup>29</sup> Even when it can take place, lawyers' courtroom advocacy is fraught with difficulties that include blocking sympathisers from attending court hearings, suppression of arguments and evidence during court hearings, and lawyer intimidation.<sup>30</sup>

While the principle of 'judicial dependence,' as Li Ling has argued,<sup>31</sup> is pervasive, resulting dysfunctions of the judicial process are especially evident in cases deemed 'politically sensitive.' Take this description, by Lawyer Li Heping, of the trial of Falun Gong practitioner Wang Bo in a 'using an evil cult to undermine the implementation of the law' case (in which he collaborated with a number of rights lawyers also including Teng Biao), by way of example.

'This "open trial" was really ridiculous...The three defendants were brought in wearing handcuffs and prison uniforms. In accordance with law, we requested that the court remove the defendants' shackles and uniforms, and the court consented. *When we tried to talk about religion and the Constitution, however, the judges repeatedly interrupted us, saying we could only speak of the facts and not of the law.* I was very angry and loudly challenged them: If the court doesn't allow lawyers to talk of the Constitution or of the law, how can it be a court? The judges were tongue-tied, but they continued to interrupt us all the same.

It should be said that all five lawyers on the defense bench performed very well and were very attentive in their exploration of facts and law. The prosecution could only ward off our blows without any power to strike back. During the trial, when we read out our defense plea, *the prosecution was humiliated and enraged, saying our political inclinations were problematic and we would be investigated.*<sup>32</sup> (Emphases added)

As a result, it is nearly impossible to win certain types of cases by use of individuated rights advocacy through the judicial process or any other institutionalised process controlled by the Party-State. Even in cases of clear miscarriage of justice, lawyers can find themselves unable to

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<sup>28</sup> Human Rights Watch, 'Tiger chairs and cell bosses: police torture of criminal suspects in China' (13 May 2015), available at <<https://www.hrw.org/report/2015/05/13/tiger-chairs-and-cell-bosses/police-torture-criminal-suspects-china>>; Committee Against Torture, 'Concluding observations on the fifth periodic report of China (advance version)' (9 December 2015), available at <[http://www.savetibet.org/wp-content/uploads/2015/12/CAT\\_C\\_CHN\\_CO\\_5\\_22477\\_E.pdf](http://www.savetibet.org/wp-content/uploads/2015/12/CAT_C_CHN_CO_5_22477_E.pdf)> .

<sup>29</sup> 'Even' the far more open process in liberal systems can exhibit such intransigence to an astonishing degree, as discussed comparatively by Mike McConville in Mike McConville and Eva Pils (editors), *Criminal Justice in China: Comparative Perspectives*, Elgar Publishing (2013) (Chapter 1).

<sup>30</sup> Chapter 4 of Eva Pils, *China's human rights lawyers*, *supra*.

<sup>31</sup> Li ling, *supra*.

<sup>32</sup> Li Heping, 'The Wang Bo Case and Freedom of Religion,' 2010, draft on file with author, translated by Stacy Mosher.

obtain adequate redress for their clients. A lawyer who had worked since the early 2000s in rights defence summed up his experience as follows:

‘As long as there is no judicial independence, whatever you do in the courtroom in those cases of repression really just amounts to helping them enact a piece of theatre. They don’t care.’<sup>33</sup>

In conversation and in their own writing in the social media, rights lawyers have characterised the attitude of the Party-State in these contexts as ‘anti-rule-of-law (*fan fazhi* 反法治);<sup>34</sup> and so far as their advocacy is intended to strengthen rule of law, they regard it as rightly challenging and destabilising authoritarian control of the legal system.

In this situation, it is a logical step for lawyers to begin addressing their arguments no longer to the Court (or to the authorities) alone, and ‘to take the action from inside the courtroom to outside, and let the Great Public Jury [the Court of Public Opinion] decide.’<sup>35</sup> Speaking of the trial of Wang Bo, for example, Lawyer Li Heping also commented:

‘Even though the Party committee had the final say in the judgment of the case, a serious defense could still make an impression in court and at least win the hearts of those in the public gallery. I believe we achieved that goal in the Wang Bo case. This is not hard to understand. After all, the few judges and prosecutors who take any notice of religious issues or citizen's constitutional rights invariably side with the Party committee and resort to clichés when confronted by rule of law. These specious standpoints can't stand up under systematic, closely-reasoned questioning, and judges who don't candidly admit defeat can only balk, as in our trial. A judge who simply balks instead of speaking of fairness, justice and law falls into disrepute and loses credibility.’<sup>36</sup>

As a result of the institutional dysfunctionality exhibited by trials such as Wang Bo's, and more widely by the problems of unfair trials and denial of access to justice mentioned earlier on, lawyers have moved outside the courtroom to engage in what one might call both political and legal rights advocacy about specific cases outside the institutions and channels provided by the Party-State. Lawyers have, for example, complained publicly about not being allowed to see their criminally detained client by unfurling protest banners and holding up signs outside official buildings, subsequently disseminating images of these actions online.<sup>37</sup> They have used the social media to report on the progress of court cases, and used secretly produced pictures and video footage to disseminate evidence of torture in cases where the authorities refused to address

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<sup>33</sup> #23 2013-1.

<sup>34</sup> Chinese Lawyers for the Protection of Human Rights (中国保障人权律师团/*Zhongguo baozhang renquan lüshituan*), ‘中国保障人权律师团律师对劳教制度废止相关问题的声明 / *Zhongguo baozhang renquan lüshi dui laojiao zhidu feizhi xiangguan wenti de shengming* [Statement on Abolition of RTL and Related Problems by Chinese Lawyers for the Protection of Human Rights], 19 November 2013 at <http://www.siweiluozi.net/2013/11/statement-on-abolition-of-re-education.html>

<sup>35</sup> #23-13-1.

<sup>36</sup> Li Heping, ‘The Wang Bo Case and Freedom of Religion,’ 2010, draft on file with author, translated by Stacy Mosher.

<sup>37</sup> Lawyer Shi Qing (石青律师) [pen name], ‘营口中院非法剥夺律师阅卷权 [The Intermediate Court of Yingkou illegally refuses lawyers access to files],’ 20 April 2013, at <http://news.bboxun.com/news/gb/china/2013/04/201304040209.shtml>.



the allegation of torture.<sup>38</sup> They have also signed public statements in support of colleagues working on such cases and of colleagues who have themselves been victimised (an issue discussed in greater detail below), and they have used blogs, microblogs and the media (in particular, overseas media) to disseminate such messages.

The publication of, for example, litigation-related documents, submissions to the court, and the like, via the social media may be reprehensible in a better-functioning legal system; but in the circumstances of a system marred by obscurity and repression, some rights lawyers contend that these methods are legitimate, due to the suppression of legitimate arguments and evidence when trying to use official channels. Lawyers disagree on how much publicity is appropriate -- an older generation, represented by the well-known Lawyer Mo Shaoping, are generally more averse to publicity. As Teng Biao's reflection on this discussion illustrates, it is inseparable from a long-standing, wider debate about the nature of law and lawfulness within the constraints of an authoritarian system. Broadly speaking positivistic views, according to which the law is strictly separate from morals, are used to argue that in their professional arguments, lawyers must not concern themselves with matters thought to be beyond the letter of the law. This approach would not capture the moral responsibility we have to stand up against immoral law, at least in the liberal positivist tradition;<sup>39</sup> but understandably, such views have always been attractive as a view in systems where advocacy is risky, even dangerous.

‘According to one view, as a lawyer, you must only discuss the law, discuss what the evidence and the applicable law in a particular case are, what procedural problems exist – you can only discuss the law, not politics; you can’t talk about the persecution of religion or introduce your own political demands. Concurrently you also mustn’t take media interviews, especially from the overseas media, or hype up an issue, and so on. There is a faction that holds, to use Mo Shaoping’s phrase, that “political issues must be legalised, legal issues must be professionalised and professional issues must be technicized” and that through these “three -izations” human rights cases can be sublimated without trace.’

Other human rights lawyers hold that in the Chinese context, any legal problem is hard to separate from the influence of politics; for example, taking on [Protestant] house-church cases, undertaking criminal defence in Falun Gong cases – if you only discussed if that particular Falun Gong practitioner printed 200 or 300 [proselytising] leaflets, if they should be sentenced to two years or to five: if that’s all you discuss, it is totally meaningless, because you don’t change the outcome [anyway]. So the constitutional and freedom of religion issues in the background [of such a case] absolutely have to be discussed.’<sup>40</sup>

From Teng Biao’s and like-minded rights lawyers’ perspective, then, the approach that rejects isolating narrow legal questions from deeper constitutional and moral ones, demands more

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<sup>38</sup> He Yang, *Conversation with Lawyer Zhu Mingyong on torture* (专访朱明勇律师—黑打 / *Zhuanfang Zhu Mingyong lüshi – hei da*) by He Yang (何杨), independent documentary film, August 2010, on file with author.

<sup>39</sup> H.L.A. Hart famously insisted that the certification of legal validity was ‘not conclusive of the question of obedience.’ H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> edition, 1994.

<sup>40</sup> Teng Biao (滕彪), 中国维权运动的历史和现状 [The History and Current Situation of the Chinese Rights Defence Movement], Centre on Religion and Chinese Society, Purdue University, 13 October 2014, <https://www.purdue.edu/crcs/events/purdue-symposium-ch/purdue-symposium-2014-ch/tengbiao/>. Also Pils, 2007. Pils, Eva, “Asking the Tiger For His Skin: Rights Activism in China,” Vol XXX (2007) *Fordham International Law Journal*, pp. 1209 -1287.

expansive advocacy strategies, so as to overcome obstacles to advocacy that result from institutional dysfunction. Rights lawyers have responsibilities beyond the courtroom in situations where the courtroom is not a forum in which the law will be upheld or in which justice could possibly be achieved.

Accordingly, they should strive to achieve transparency about what they do and what the authorities do, not just because exposure of abuses is on the whole likely to promote a more favourable outcome of their case.<sup>41</sup> They also address their arguments to a wider public that may allow for the authorities to be criticised.<sup>42</sup> In conversation, rights lawyers stated that they generally eschewed encouraging their clients to trade justice for ‘leniency,’<sup>43</sup> and that they were neither inclined to, nor can they afford to, engage in any behaviour that would expose them to accusations of violating the law or professional discipline (such as, say, bribing a judge).<sup>44</sup> Even when going public does not change the outcome of the legal process they engage in, it may help to reduce or prevent further abuses – thus, human rights lawyers point out that, for example, exposure of a confession extracted by torture may result in less harsh treatment of their client.

Rights lawyers reflecting on this process showed themselves aware that using public dissemination of case-related information served a dual function in the context of legal advocacy and resistance.

‘In these typical cases, lawyers resisting together achieve that firstly, they raise legal consciousness and promote the idea of rule of law [in the general population]...Through lawyers’ resistance, the so called system-internal forces of public power are also prompted to gain a better understanding of problems that exist in their own work. This, up to a point, may help to prevent --it may help to encourage them to respect the law more in future.’<sup>45</sup>

Notwithstanding their disagreements and debates, the pressures lawyers encounter are systemic; in principle, they affect all lawyers working on similar cases. Communication about cases thus creates a natural basis for alliances between lawyers of slightly different orientation, so far as they are willing to question and disrupt the dysfunctionalities of the judicial process described earlier. This includes lawyers who see themselves as ‘diehard’ (*sike* 死嗑), tough and principled, lawyers and those who prefer the description ‘rights defence’ or ‘human rights’ lawyers (*weiquan* 维权 or *renquan lüshi* 人权 律师). A lawyer remarked that

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<sup>41</sup> This does not mean, of course, that lawyers go out of their way to let the authorities know about activities likely to trigger persecution; or that they feel under obligation to disclose their activities. #122-16-1.

<sup>42</sup> #74 -13-1. See Zhang Xueran, ‘China’s All-Star Legal Team Pleads for Defendants’ Rights On Social Media,’ Tea Leaf Nation 25 July 2012 at <http://tealeafnation.com/2012/07/bilingual-brew-chinas-all-star-legal-team-pleads-for-defendants-rights-on-social-media>.

<sup>43</sup> Jiang Jue, *Criminal Reconciliation in Contemporary China: An Empirical and Analytical Enquiry* (Cheltenham: Edward Elgar, 2016).

<sup>44</sup> #23-10-3.

<sup>45</sup> #74 2013-1. See also Ch. 4 and Zhang Xueran, ‘China’s All-Star Legal Team Pleads for Defendants’ Rights On Social Media,’ Tea Leaf Nation 25 July 2012 at <http://tealeafnation.com/2012/07/bilingual-brew-chinas-all-star-legal-team-pleads-for-defendants-rights-on-social-media>.

‘Chinese human rights lawyers are amongst the most vibrant dissident forces in Chinese civil society these days. While the pressure I spoke of brings about more self-censorship amongst some, amongst others, it enhances a sense of opposition and shared values.’<sup>46</sup>

Comments such as these reflect the fact that the dysfunctionality of legal institutions also encourages a move from ‘human rights as law’ to ‘human rights as politics,’ in Michael Ignatieff’s phrase.<sup>47</sup> Since the Party-State system does not accommodate oppositional politics and strictly controls independent civil society activities, the move to ‘human rights as politics’ enhances the system-oppositional nature of rights advocacy, and thus traits which (as the threat issued by prosecutors to the defence lawyers, quoted above, already illustrated) may be regarded as subversive by the authorities.

In sum, although they are severely limited within their institutionally defined roles, lawyers can make a conscious choice to oppose such limitations, even in the highly restrictive setting of the authoritarian Chinese legal system. They can appeal to liberal values, rules and principles recognised in the laws of the Chinese Party-State, even though these values, rules and principles are in conflict with authoritarian principles that are also recognised by the system. When they articulate their insistence on adherence to those rules and principles, they engage in a form of legal advocacy that is concurrently an exercise of their human rights of expression, and a form of political resistance, because the authorities view it thus. Their use and experience of public legal advocacy, moreover, can awaken lawyers to the potential of (mass) communication as a tool of resistance. In contrast to liberal-democratic settings, there is no alternative of more tolerated oppositional politics, moreover.<sup>48</sup>

The logical next step, a step that has in fact already been taken by the time they have established informal communicative networks, is to create independent associations.

### **III Advocacy NGOs and case- and cause-based professional organisations**

Chinese lawyers face many obstacles to independent professional organisation. The authorities in China have established an official professional organisation for lawyers that is strictly hierarchical. Membership of the All China Lawyers’ Association (ACLA) is compulsory for all licenced lawyers, and that seeks to control the professional activities of lawyers down to the question of what kinds of case they may take on and what strategies they ought to pursue in handling these cases. Official lawyers’ associations could therefore be described as agents of state corporatism.

The ACLA and its subordinate local entities can exert great pressure on law firms and individual lawyers working in these firms through a professional licencing system, in whose operation it plays a central role, and the justice authorities can impose (further) disciplinary and punitive measures, although ACLA and its subordinate organisations claim to represent the legal

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<sup>46</sup> #74 2014-1.

<sup>47</sup> Michael Ignatieff, ‘Human Rights As Politics / Human Rights as Idolatry,’ The Tanner Lectures, Princeton, 4-7 April 200, available at <[http://tannerlectures.utah.edu/\\_documents/a-to-z/i/Ignatieff\\_01.pdf](http://tannerlectures.utah.edu/_documents/a-to-z/i/Ignatieff_01.pdf)>, at p. 6.

<sup>48</sup> Michael Walzer, ‘The Politics of Resistance,’ *Dissent Magazine*, 1 March 2017, <[https://www.dissentmagazine.org/online\\_articles/the-politics-of-resistance-michael-walzer](https://www.dissentmagazine.org/online_articles/the-politics-of-resistance-michael-walzer)>, juxtaposes resistance with oppositional politics.

profession's interests.<sup>49</sup> ACLA also became the conduit through which the Party unfolded a 'total coverage' (*quan fugai* 全覆盖) campaign intended to ensure that all law firms would have a Party branch established or associated with them.<sup>50</sup>

In line with this corporatist approach, the political-legal system in China does not tolerate free professional associations for lawyers and severely restricts nongovernmental civil society organisations.<sup>51</sup> Lawyers, as a consequence, face regulatory limitations if they wish to found or join independent professional organisations or advocacy NGOs. Thus several important lawyer-driven rights advocacy NGOs, including the Open Constitution Initiative discussed just below, the Transition Institute, and China Against Death Penalty, were either registered as commercial non-profit enterprises, or not registered at all. Throughout the research period, NGOs considered hostile are at risk of being charged with tax violations or dissolved, as well as of monitoring and other forms of persecution. Criminal law can also be used to control lawyers, for example, by charges of offences against 'state security' or of public order offences;<sup>52</sup> and in 2015, restrictions discussed later (in Part V) were introduced. The Criminal Law has a special provision criminalising 'illegal assembly,'<sup>53</sup> which can be used to disrupt meetings, as discussed later on (in Part IV) with reference to the New Citizen and Southern Street movements.

In addition to rules and measures limiting lawyers' ability to organise independently, the Party-State's security apparatus also uses measures such as electronic surveillance, requests for 'chats,' 'being travelled,' house arrest, forced disappearances and torture to control lawyers.<sup>54</sup> Lawyer repression became increasingly severe from around 2004,<sup>55</sup> when Lawyer Gao Zhisheng 高智晟 engaged in online advocacy to publish the narratives of Falun Gong practitioners who detailed their experience of torture at the hands of the State. Authorities including the justice bureaux, official lawyers' associations, the judiciary, and the police domestic security protection squads or *guobao* (国保) as well as the national security or *guo'an* (国安) authorities contribute to repression, which ranges from instructions to lawyers not to take on particular cases or to handle them in a particular way, to disbarment, prison sentences, forced disappearances and torture. The authorities have on occasion explicitly stated toward lawyer victims of such

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<sup>49</sup> For ACLA's stated goals see ACLA website; Article 45 of the Law on Lawyers on the role of Lawyers' Associations.

<sup>50</sup> Wu Fengshi and Chan Kin-man, 'Graduated Control and Beyond: the Evolving Government-NGO Relations,' *China Perspectives* 2012 no. 3 at p. 9; Spires, Anthony, 'Contingent Symbiosis and Civil Society in an Authoritarian State: Understanding the Survival of China's Grassroots NGOs,' *American Journal of Sociology*, Vol. 117, No. 1 (July 2011), pp. 1-45.

<sup>51</sup> The passage of new legislation on domestic charities and on foreign NGOs testifies to this tendency. Wong, Edward, 'Clampdown in China Restricts 7,000 Foreign Organizations,' *New York Times*, 26 April 2016, [http://www.nytimes.com/2016/04/29/world/asia/china-foreign-ngo-law.html?\\_r=0](http://www.nytimes.com/2016/04/29/world/asia/china-foreign-ngo-law.html?_r=0).

<sup>52</sup> Tang, Didi, 'China hits activists with common-crime charges,' *Associated Press*, 27 May 2014, <http://bigstory.ap.org/article/china-hits-activists-common-crime-charges>.

<sup>53</sup> 中华人民共和国刑法 [PRC Criminal Law], passed on 1 July 1979, promulgated on 6 July 1979, and effective as of 1 January 1980, last revised on 29 August 2015, at <http://chinalawtranslate.com/%E4%B8%AD%E5%8D%8E%E4%BA%BA%E6%B0%91%E5%85%B1%E5%92%8C%E5%9B%BD%E5%88%91%E6%B3%95%E5%BC%882015%E5%B9%B4%E4%BF%AE%E6%AD%A3%E5%BC%89/?lang=en>, Article 296.

<sup>54</sup> Pils, Disappearing (*supra*).

<sup>55</sup> Preliminary Opinions on the reform of the Judicial System and Working Mechanisms 2004, 626 f. Discussed in Pils, Eva "Disappearing" China's Human Rights Lawyers,' in Mike McConville and Eva Pils (editors), *Comparative Perspectives on Criminal Justice in China*, Elgar Publishing (2013) ('Disappearing'); Pils, Eva, 'Asking the Tiger For His Skin: Rights Activism in China,' Vol XXX (2007) *Fordham International Law Journal*, pp. 1209 -1287 ('Asking the Tiger').

measures that their goal is isolating them from other lawyers and preventing them from forming groups and building alliances, following the strategy ‘split and disintegrate, discipline and strike, educate and rescue’ (*fenhua wanjie, chengjie daji, jiaoyu wanjiu* 分化瓦解, 承接打击, 教育挽救).<sup>56</sup> Repression, on the other hand, gives lawyers incentives to tackle the political causes of their predicament.<sup>57</sup>

Organisation by human rights lawyers and other human rights defenders must be understood against this background. It has adopted, broadly speaking, two types of strategy: the formation of advocacy groups bearing a name and visible organisational structure, exemplified in the present discussion by Gongmeng, one of the earliest groups; and the creation of more fluid, less visible structures of interaction and coordination amongst rights lawyers, without setting up formal or informal nongovernmental *organisations*. The experience of Xu Zhiyong and the organisations and initiatives he started spans across this spectrum.

In 2003, the year of the Sun Zhigang Incident, Xu and some fellow legal academics including Teng Biao came together to form a *gongmin lianmeng* 公民联盟 or ‘Civic Alliance,’ that became known as *Gongmeng* (in English, Open Constitution Initiative).<sup>58</sup> As a rights advocacy group, Gongmeng successfully engaged in advocacy on a variety of human rights issues that also represented mass grievances. For example, true to their origins in a case concerning liberty of the person, they led a campaign against the use of so-called Black Jails, unofficial places of detention used for holding unwelcome petitioners, come to the capital to lodge complaints against the authorities. Gongmeng worked with petitioners to go to such unofficial holding places and demand that inmates be liberated. They did so generally without immediate success, because the jailors were concerned about the consequences of exposure for themselves;<sup>59</sup> but eventually, the central authorities were persuaded to make clear that at least in principle, unofficial prisons were unacceptable, and to shut down some of them.<sup>60</sup> Gongmeng also worked on other mass grievances, such as forced evictions, the household registration system, and equal education rights for the children of migrant workers. They also took on cases and issues that arose ad hoc, such as the tainted milk-powder scandal in 2009, a case of adulterated milk-powder that came to affect some three hundred thousand babies fed tainted milk, causing an unconfirmed number of death,<sup>61</sup> and they did not shy away from working on issues the authorities were bound to regard as highly ‘sensitive,’ such as the human rights of Tibetans in the wake of unrest that broke out in Tibet in 2009.<sup>62</sup>

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<sup>56</sup> #23 2013-1. Summing up their experience of repression, a lawyer commented in July 2014, ‘Pressure from the authorities ... is invisible but palpable. It comes from the departments in charge, such as the justice bureaux and lawyers’ association and judicial organs, and from the secret police such as the guobao (public security domestic security protection squad) and guo’an (state security), and then there is a sort of additional, comprehensive pressure coming from all sides.’ #73 2014-3.

<sup>57</sup> Eva Pils, “‘Disappearing’ China’s Human Rights Lawyers,” in Mike McConville and Eva Pils (editors), *Comparative Perspectives on Criminal Justice in China*, Elgar Publishing (2013); “‘Asking the Tiger For His Skin: Rights Activism in China,’ Vol XXX (2007) *Fordham International Law Journal*, pp. 1209 -1287;’ Chapter 6 of *China’s human rights lawyers*, *supra*.

<sup>58</sup> #2 2013-3.

<sup>59</sup> Xu Zhiyong is interviewed about this work by Melissa Chan, ‘China’s Black Prisons Uncovered,’ 3 June 2009, at <http://chinadigitaltimes.net/2009/04/chinas-black-jails-uncovered/>

<sup>60</sup> ‘Inside China’s “Black Jails,”’ Al Jazeera 13 March 2012 at <http://blogs.aljazeera.com/asia/2012/03/13/seeking-answers-inside-chinas-black-jails>

<sup>61</sup> Li Fangping, ‘The Zhao Lianhai Case of “Picking Quarrels and Provoking Trouble,”’ *Human Rights Bi-weekly*, 30 March 2010, <http://www.hrichina.org/en/content/4845>.

<sup>62</sup> 藏区 3.14 事件社会、经济成因调查报告的副本 <http://chinaseries.blogspot.co.uk/2009/06/314.html>。



As official structures like ACLA were clearly hostile to their advocacy and, indeed, colluded in their persecution, and conventional, NGO-like civil society platforms like NGOs were liable to be persecuted, lawyers had to find other ways of creating effective advocacy groups. According to several lawyers, the formation of independent associative structures (*lǚshituán* 律师团) is a direct reaction to the official associations' general failure to protect and occasional collusive attempts to persecute them. For example, one lawyer stated:

‘(...) Legal teams are formed because the Lawyers Associations are inactive – they do not function as organisations for lawyers.’<sup>63</sup>

A colleague of his elaborated, arguing that ‘the judicial authorities’ – including judicial bureaux – had failed them.

‘My view is that lawyers’ teams emerged because the judicial authorities didn’t act in accordance with the law and do not respect the law. If lawyers could engage in regular legal practice, then the judicial authorities would not have triggered resistance from the lawyers. The lawyers resist, because very commonly there is no justice in the judicial process. Lawyers feel that if each one of them just relies on themselves, they are too weak. So they get together and unite – spontaneously, without there being an organisation.’<sup>64</sup>

A widely noticed example of the legal teams mentioned here was that established in 2011 in the case of the ‘Beihai lawyers,’ in which dozens of lawyers travelled to Beihai City to provide criminal defence and moral support to four of their colleagues, detained on patently spurious charges of falsifying evidence, after defending four (later five) young men whose confessions to a murder they had not committed had been extracted through torture. The lawyers who went to rescue their colleagues in turn suffered attacks at the hand of thugs, including the very severe beating of Lawyer Li Jinxing 李金星; but they were able to use social media to report their own plight, that of their colleagues, and their colleagues’ clients, successfully causing widespread outrage in professional circles, and ultimately achieving convictions for a lesser crime for the original defendants and the release of their professional colleagues. The case was widely seen as a (relative) success signalling the emergence of the legal team as a significant socio-political phenomenon.<sup>65</sup>

Especially from 2010 onward, human rights lawyers have also formed or discussed the possible formation of a number of other groups whose focus is not an individual case but, rather, a particular cause or issue, such as the death penalty,<sup>66</sup> torture, forensic evidence; disability rights, and forced abortions. These groups pool expertise and insights to work on individual cases of injustice while at the same time seeking to engage in wider advocacy by reporting on

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<sup>63</sup> #30 2013-1; similarly #70 2013-1; #67 2013-1 (no audio-recording), #14 2013-1.

<sup>64</sup> #71 2013-1

<sup>65</sup> Chen Yanhui (湛彦辉), ‘内地现律师组团打官司 / *Neidi xian lǚshi zu tuán da guansi* [The phenomenon of lawyers’ litigation teams emerges in Mainland],’ 9 January 2012 at [http://news.ifeng.com/shendu/fhzk/detail\\_2012\\_01/09/11851698\\_0.shtml](http://news.ifeng.com/shendu/fhzk/detail_2012_01/09/11851698_0.shtml); also #85 2013-1.

<sup>66</sup> The less explicit name of the group in Chinese is 北京兴善研究所 / *Beijing Xingshan Yanjiusuo*. China Against Death Penalty (CADP) / 北京兴善研究所 / *Beijing Xingshan Yanjiusuo*, website at [www.cadpnet.org/en/](http://www.cadpnet.org/en/) (link dead as of November 2016).

cases they handle and holding training and research meetings. There is also a Human Rights Lawyer Group that has announced its existence through *weibo* (微博) micro-blogs and other social media such as WeChat (*weixin*, 微信), and Telegram (*dianbao*, 电报),<sup>67</sup> and that (partially) migrated, or populated in new formations, groups set up on Whatsapp and Signal as the other social media became less safe from Party-State scrutiny and interference.<sup>68</sup> Even at a time when the number of human rights lawyers had risen to an estimate 300 or more,<sup>69</sup> lawyers explained that three hundred was not enough – that in order to become a significant force in civil society, a thousand, or even five or ten thousand lawyers would be needed,<sup>70</sup> not least because rights lawyers themselves were in constant need of legal counsel. A Lawyers Rights Defence Network, set up to meet this demand, was described as having

‘our own website, our own decision mode, and our own way of seeking donation.... we want to establish a grassroots NGO that complements the official Lawyers’ Association, to help lawyers in distress, for example, when they disbarred.’<sup>71</sup>

The lawyer went further to explain their relationship with the official lawyers’ associations.

Of course we are in fact a lawyers’ association but we don’t say so – we are entirely set up like a bar association, but we are more democratic than the [official] lawyers’ association, for example through our voting mechanism.<sup>72</sup>

Rights lawyer and scholar Teng Biao 滕彪 has observed that these efforts are reminiscent of what the scholar Clay Shirky has sought to analyse as a global phenomenon of social organising ‘without organisation’ in the time of the internet and social media.<sup>73</sup> Shirky argues that certain uses of the internet allow for mass amateurisation of certain kinds of action, such as journalistic reporting, and that they challenge traditional ideas of how political power is organized in (sovereign) states with governments and related structures. While he does not think that the tectonic shift brought about by new communication forms will make government wither away, he argues that this shift does affect what he describes as an institutional monopoly on large scale

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<sup>67</sup> Voice of America, ‘维权律师发起成立中国保障人权律师服务团/ *Weiquan lüshi faqi chengli Zhongguo baozhang renquan lüshi fuwutuan* [Chinese *weiquan* lawyers initiate and establish a Human Rights Protection Lawyers’ Service Team], *VoA* (Chinese), 15 September 2013 at <http://www.voachinese.com/content/china-right-20130915/1750006.html>. Note that For a news report on this group (中国人权保障律师服务团), see 维权律师发起成立中国保障人权律师服务团 [Chinese *weiquan* lawyers initiate and establish a Human Rights Protection Lawyers’ Service Team], *VoA* (Chinese), 15 September 2013 at <http://www.voachinese.com/content/china-right-20130915/1750006.html>.

<sup>68</sup> Groups with similar names kept being formed, dissolving, and regrouping from 2013 until the end of the period during which research for this project was conducted. The key people remained largely the same. The author followed these migrations over the years and is primarily part of groups on Telegram, Whatsapp and Signal as the time of this writing.

<sup>69</sup> #73 2014-1.

<sup>70</sup> #14 2014-1, #22 2014-1, #73 2014-1.

<sup>71</sup> #73 2014-1.

<sup>72</sup> #73 2014-1.

<sup>73</sup> Teng Biao 2012a, ‘Rights Defence, Microblogs, and the Surrounding Gaze: The Rights Defence Movement Online and Offline,’ in *Locating Civil Society: Communities Defending Basic Liberties*, Issue of *China Perspectives* 2012 / no.3; Shirky, Clay, *Here Comes Everybody: The Power of Organising Without Organisations*, Penguin, London, 2008.

coordination currently held by governments. This institutional monopoly, in Shirky's view, is challenged by today's new media and the fluid, easily changing, unfixed forms of social coordination and flash-mob style action challenging power they allow for.

Such forms of organizing are of clear relevance to civil society activism in today's China, and they might stand a chance of succeeding even in the restrictive conditions of the Chinese system. New modes of activism present unprecedented challenges to the government, which is certainly correctly characterized as hitherto holding a monopoly on large scale organization. Yet, the examples of both the human rights lawyer groups mentioned above, and the more ambitious and potentially momentous rights-lawyer-initiated New Citizen Movement discussed below also illustrate certain inherent limits of politically organizing without organization, at least in China.

#### IV The rise and suppression of the New Citizen Movement

The NGO *Gongmeng* had achieved some remarkable successes; but in 2009, Gongmeng and Xu Zhiyong came under attack for alleged tax evasion.<sup>74</sup> The company that had been registered to give *Gongmeng* a legal existence, continued to exist. But as it had been ostracised and forced to stop taking foreign funding, the group continued to operate only with difficulty.<sup>75</sup> Following the attempt to crush it, and given an overall tightening of advocacy spaces observed by rights lawyers, Gongmeng seemed to be a no longer entirely adequate platform for pursuing the civil right goals of the 'civic alliance' it was originally meant to be. Its co-creator Xu had also reached the view that there should be a change in strategy and approach. Speaking at a conference in 2013, Xu explained:

'In the nearly ten years from the Sun Zhigang Incident, our main work really was rights defence in individual cases... [but] from last year [2012] onward, our modus operandi changed. We have gone from [working on] individual cases to wider advocacy, calling for everyone to be a citizen.'<sup>76</sup>

The New Citizen Movement, initiated in May 2012 by Xu and others, reflected this changed, more explicitly political mode of advocacy. More assertively than the earlier *Gongmeng* organisation, the New Citizen Movement makes use of a normatively rich and ambitious concept of citizenship. It is a conception that reaches far back into China's indigenous liberal or republican tradition, with the idea of *gongmin* 公民, 'public person,' initially associated with intellectuals of the late imperial area such as Kang Youwei, and political figures such as Sun Yat-

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<sup>74</sup> Osnos, Evan, 'Where is Xu Zhiyong?', at [http://lawprofessors.typepad.com/china\\_law\\_prof\\_blog/2009/07/where-is-xu-zhiyong-evan-osnos-in-the-new-yorker.html](http://lawprofessors.typepad.com/china_law_prof_blog/2009/07/where-is-xu-zhiyong-evan-osnos-in-the-new-yorker.html).

<sup>75</sup> #2 2009-1; Teng Biao (滕彪); 公盟不死 / *Gongmeng bu si* [Gongmeng is not dead]. 17 January 2009 at <http://blog.qq.com/qzone/622007804/1248271496.htm>; 公民在行动 / *Gongmeng zai xingdong* [Citizens are being active], Citizen Monthly (公民月刊 / *Gongmin yuekan*), January 2009; Simon, Karla, 'The Regulation of Civil Society Organisations in China,' (2011) at SSRN: <http://ssrn.com/abstract=1781075>.

<sup>76</sup> Xu Zhiyong, intervention at 'The Constitution, the Media and the Chinese Rights Defence Movement: Ten Years after the Death of Sun Zhigang,' Hong Kong, 13 April 2013, <http://www.law.cuhk.edu.hk/en/research/crj/news/20130413-sunzhigang-coverage.php> (Xu was under informal house arrest in mainland China and spoke via Skype).

sen,<sup>77</sup> as well as to the European enlightenment era.<sup>78</sup> It evokes older historical references to the broader concept of *gong* 公.<sup>79</sup> As scholar and rights advocate Xu Zhiyong 许志永 explained at a ‘civic meal’ in late 2012, the concept

‘[...] reflects what sort of system the State should have, what the relationship between the State and its citizens should be, and [the idea of] civil society as an independent and free entity.’<sup>80</sup>

Choosing ‘freedom, justice, love’ (*ziyou* 自由, *gongyi* 公义, *ai* 爱) as its motto, the Movement, according to Xu, saw these values as expressive of ‘the new democratic spirit of the Chinese nation’ and of ‘the universal values of mankind.’<sup>81</sup>

In 2010, Xu and some others published an online ‘Citizens’ Pledge,’ calling for citizens to sign up by sending an email. The general pledge stated:

1. ‘My conduct will be rooted in conscientiousness, understanding, respect, and love and care for my fellow human beings;
2. I will respect the Constitution and the laws and defend their correct implementation;
3. In my life, I will, with legal means and with a caring heart, defend social justice and practice/manifest social righteousness.’<sup>82</sup>

The online call also specified how citizens in different roles and positions, including lawyers, should act:

4. ‘In my station at work I will follow the following minimum moral standards:  
.... As a lawyer, I will be true to the law and not bribe judges.’<sup>83</sup>

The email action provided the initiators with a database of names, which they could then contact to initiate further activities. On this basis, in the course of meetings apparently beginning in May 2012,<sup>84</sup> Xu and others founded the New Citizen Movement.

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<sup>77</sup> The founding father of the Republic of China also claimed as founding father of the Party’s erstwhile arch enemy, the Kuomintang. For this origin of the calligraphy see Bei Li, calligraphy, 12 June 2012 at <https://plus.google.com/107919448256984307579/posts/UqUxVFoDziD>.

<sup>78</sup> Shama, Simon, *Citizens. A Chronicle of the French Revolution*, London 1989.

<sup>79</sup> As in *tian xia (wei) gong* 天下为公.

<sup>80</sup> Xu, Zhiyong, ‘谁把“自由, 公义, 爱”当成敌人, 一定是中华民族的敌人/ Shuei ba “ziyou, gongyi, ai” dangcheng diren, yiding shi Zhonghua minzu de diren! [Who turns “freedom, justice, love” into an enemy is clearly an enemy of the Chinese nation!],’ Citizen Special Issue (公民专刊 *Gongmin zhuankan*) no. 8 (2013), p. 76 ff. at p. 78.

<sup>81</sup> Xu Zhiyong, intervention at ‘The Constitution, the Media and the Chinese Rights Defence Movement: Ten Years after the Death of Sun Zhigang,’ Hong Kong, 13 April 2013, <http://www.law.cuhk.edu.hk/en/research/crj/news/20130413-sunzhigang-coverage.php>.

<sup>82</sup> Boxun (Peacehall) Website, ‘著名维权人士许志永发布《公民维权手册》 [Prominent human rights defender Xu Zhiyong publishes “Citizen Rights Defence Handbook”],’ 18 April 2010, <http://boxun.com/news/gb/china/2010/04/201004182312.shtml>; copy of handbook available at <http://www.scribd.com/doc/17479805/%E5%85%AC%E6%B0%91%E7%BB%B4%E6%9D%83%E6%89%8B%E5%86%8C>; Custer (trans), ‘The Citizen’s Pledge,’ 20 June 2012 at <http://chinageeks.org/2010/06/xu-zhiyong-et-al-the-chinese-citizens-pledge/>.

<sup>83</sup> *Ibid.* It is of note that the ‘New Citizen Movement’ uses as its logo a distinctive calligraphy usually displayed white or silver on blue, based in a piece of calligraphy by Sun Yat-sen..

What makes the concept of citizen a good point of reference around which to organise a movement is that it is so clearly recognised by official-legal jargon, as much as it also is a concept used in the context of rights defence and dissent.<sup>85</sup> So, for example, the PRC Constitution uses the term, even as authorities reject wider liberal and democratic political values and had remained distrustful of the idea of ‘citizens’ society’ or ‘civil society’ as an element of political legitimacy.<sup>86</sup> The concepts of love and – to a lesser degree – justice and freedom, on the other hand, seem to speak directly to the communities of those who experience injustice or oppression or emotional or other forms of deprivation. Their use reflects the expectations of a pop culture dependent on ‘emotional’ social media communication and emotive politics in ways that have been discussed with some concern in the context of other popular movements. Yet as seen from the quoted passages above, and in contrast to populist parties and movements elsewhere,<sup>87</sup> the New Citizen Movement explicitly aims to overcome ‘us against them’ narratives and to foster inclusiveness, rather than *ressentiment* or fear. This aspect of its stated agenda calls to mind the work of contemporary political philosophers seeking to craft novel interpretations of certain ‘political emotions.’ According to the argument Nussbaum has advanced, for example, love as a distinct form of public emotion (‘political love’) ought to be cultivated in a liberal society, and it ‘matters to justice.’<sup>88</sup>

But what could this movement achieve in China’s highly illiberal, restrictive and repressive conditions? Despite their ambitious political advocacy goals, the initiators realised that their options were limited. For example, there was no chance of founding a political party. All independent, oppositional parties ever formed in the history of the PRC have been either crushed or reduced to total insignificance; and many of their founders have gone to prison for many years. Drawing on past examples of failed attempts openly to found a political party, a lawyer commented,

‘Just think, whether we talk about the Chinese Democratic Party of 1998,<sup>89</sup> or the Chinese Social Democratic Party of 1992,<sup>90</sup> everybody has by now thought it through; or perhaps as a result of recent developments, we are now even clearer than before: the risks

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<sup>84</sup> The initial meeting was organised in a discreet manner but nevertheless interrupted by the police.

<sup>85</sup> Goldman, Merle, *From Comrade to Citizen: The Struggle for Political Rights in China*, Harvard University Press, Cambridge Mass.: 2004 at p. 10 f.

<sup>86</sup> In addition to the later Document No 9 (discussed later), see e.g. Zhou Benshun, ‘走中国特色社会管理创新之路/Zou Zhongguo tese shehui guanli chuangxin zhi lu / The Path to Innovation of Social Management with Chinese Characteristics,’ 16 May 2011 at [http://www.qstheory.cn/zxdk/2011/2011010/201105/t20110513\\_80501.htm](http://www.qstheory.cn/zxdk/2011/2011010/201105/t20110513_80501.htm) ; translation based on that by Flora Sapio at her *Forgotten Archipelagoes* blog, entry of 6 July 2011 at <http://florasapio.blogspot.hk/2011/06/belated-translation-zhou-benshun-road.html>.

<sup>87</sup> Toril Aalberg and Claas de Vreese, ‘Comprehending Populist Political Communication,’ in *Populist Political Communication in Europe* (Routledge, Abingdon, 2016) at pp. 4 f.; Sara Ahmed, *The cultural politics of emotion* (Routledge, Abingdon, 2006), especially Chapter 3 (‘The affective politics of fear’) at pp. 62-81.

<sup>88</sup> Martha Nussbaum, *Political Emotions* (Harvard University Press, Cambridge, Mass., 2013), especially chapter 11 (‘How love matters to justice’), at pp. 388 f.

<sup>89</sup> See the Chinese Democratic Party [中国民主党] at <http://www.hqcdp.org/> (Chinese) and <http://www.hqcdp.org/english/> (English), accessed 28 December 2013.

<sup>90</sup> See the Chinese Social Democratic Party [中国社会民主党] at <http://www.csdparty.org/index.html>, accessed 28 December 2013.



associated with this kind of organisation are extremely high. Consider that Hu Shigen,<sup>91</sup> for example, was sentenced to 20 years. And Qin Yongmin [to eleven years].<sup>92</sup> Their prison sentences were just too long.<sup>93</sup>

It was equally impossible to create an NGO, registered or not, that would serve the function of propagating a political ideal of ‘citizenship’ -- after all, this had been tried with the NGO Gongmeng, short for ‘civic alliance,’ which (as detailed earlier on) had come under increasing pressure from the authorities.

The Movement, instead, took recourse to the forms of action discussed as social organising ‘without organisation’ by Clay Shirky,<sup>94</sup> echoing the methods adopted by the movements of the ‘Arab Spring’ and by ‘Occupy’ movements around the world. The New Citizen Movement’s goal was to bring people together as citizens. Accordingly, all of the Movement’s actions made use of the social media and other internet tools, and they included a range of easy-to-join activities, the simplest of which was to gather for a meal.<sup>95</sup>

‘Everybody comes together under a shared identity to join in a meal and to discuss some common issues together...Citizens in all locations shall develop spontaneously; they control their own stories, and people in each location do their own thing and have their own local topics, so that Guangzhou and Chengdu have their different local topics.’<sup>96</sup>

As co-initiator Xiao Shu explained, one point of this action was to ‘lower the threshold’ for citizens’ participation – what could possibly be wrong about, and how could the authorities be alarmed by, people having a meal together?

Gathering for a meal allowed the movement to realise the goals of inclusiveness, as well as to convey a peaceful message, consciously opposed to any idea of underground or violent opposition.<sup>97</sup> At the same time, even the decision to attend a ‘civic dinner’ could be interpreted as a conscious political choice, just as the appeal to the concept of citizenship could be understood both as a simple descriptive fact and as a political message, namely that everybody could *choose*

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<sup>91</sup> Human Rights in China, ‘Prisoner Profile: Hu Shigen,’ at <http://www.hrichina.org/sites/default/files/PDFs/CRF.4.2004/PrisonerProfile4.2004.pdf>, accessed 28 December 2013.

<sup>92</sup> ‘Human Rights in China, ‘Democracy Activist Qin Yongmin Released from Prison after 12-Year Sentence,’ HRIC, 29 November 2010 at <http://www.hrichina.org/en/content/4879>, accessed 28 December 2013.

<sup>93</sup> #2 2013-7.

<sup>94</sup> Teng Biao 2012a, ‘Rights Defence, Microblogs, and the Surrounding Gaze: The Rights Defence Movement Online and Offline,’ in *Locating Civil Society: Communities Defending Basic Liberties*, Issue of *China Perspectives* 2012 / no.3; Shirky, Clay, *Here Comes Everybody: The Power of Organising Without Organisations*, Penguin, London, 2008.

<sup>95</sup> ‘Citizen meals’ were to take place at the same time (on the last Saturday of every month) in different cities across China.

<sup>96</sup> Xu, *ibid*.

<sup>97</sup> Xu Zhiyong 2013b, ‘公民许志永: 关于月末公民同城聚餐和“小圈子”区别的说明 [Citizen Xu Zhiyong: Explanation concerning the difference between end-of-month same-city citizen dinners and ‘small circles’],’ 6 May 2013 at <http://www.canyu.org/n72755c6.aspx>. See also Centre for Rights and Justice, CUHK, recording of Xu’s Sykpe comments at the public seminar ‘The Constitution, the Media and the Chinese Rights Defence Movement: Then Years after the Death of Sun Zhigang,’ at the Centre for Rights and Justice, Faculty of Law, The Chinese University of Hong Kong, 13 April 2013, at <http://www.law.cuhk.edu.hk/research/crj/news/20130413-sunzhigang-coverage.php>.

to be a citizen in the normative, political liberal or republican sense, and that collectively, citizens had political power.

For the purpose of this project, the author was able to observe some three or four ‘citizen meals’ held in different locations, with different participants, in 2012 and 2013. While some meetings were arranged in somewhat clandestine manner to avoid participants’ being prevented from attending, the meals as such seemed open and were not organised using a pre-determined agenda.<sup>98</sup> The openness this reflected was characteristic and, in the perspective of the New Citizen Movement’s commitments, crucial – as participants explained, no citizen should be excluded. The pragmatic answer to the pervasive possibility of monitoring by the authorities was demonstratively not to mind; or at least to refuse to nurture suspicion, because this was the best way of subverting the intended effects of monitoring.

Participants at the ‘citizen meals’ observed included lawyers, petitioners, teachers, and writers; specific human rights issues; and perceived deficiencies of the existing political system. The conversation ranged across diverse topics. It included political questions such as how a greater number of people could be motivated to identify and act as citizens with rights, in the spirit of the Movement, and how best to achieve the stated aims of promoting participants’ self-awareness as citizens with rights and responsibilities, foster a sense of civic community, craft messages of rights advocacy, and protest social grievances that could engage a wide community of people.<sup>99</sup> But conversation was by no means limited to such political topics.<sup>100</sup>

Soon, however, collective actions became more explicitly political; and therefore the ‘threshold’ – or the risks – of participation rose. In the course of 2013, flash-mob-like demonstrations by small groups of people unfurling banners in public places and later making pictures of their protest available online were used to call for asset disclosure by public officials. This might be read as a bid to connect to a simultaneously held official anti-corruption campaign; however, in the official campaign the authorities of course decided who should be investigated,<sup>101</sup> one of the reasons why some interpreted it as merely a purge of political opponents. By asking for general financial disclosure on the part of (major) public officials, the New Citizen Movement made the point that to be effective, anti-corruption measures must eliminate the arbitrary selection of targets.

Another campaign was for ‘equal education rights’ (*jiaoyu pingdeng quan* 教育平等权) and aimed primarily to protest the widespread practice of denying the children of migrant workers in the cities access to state-funded schools. Like the detention system that provided the setting for Sun Zhigang’s death, the bifurcation of rural and urban citizens is based on the *hukou* or ‘household registration’ system, a roots cause of what some have described as a duality of higher-and loser class citizens in China. This system was created in the late 1950s,<sup>102</sup> when China practiced a planned economy. With the Reform and Opening era, it lost its original

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<sup>98</sup> At one meeting, someone showed up who said they had come in response to an online announcement of the gathering; they seemed not to be acquainted with any other participants. This participant, too, was welcomed and included in discussion.

<sup>99</sup> Author observation in at Citizen Meal meeting in 2012.

<sup>100</sup> Author observation on three different occasions in two different locations in 2012 and 2013.

<sup>101</sup> For a discussion of recent trends in the context of Party investigations, see An Pei (安培), 网事焦点一案双查 / *wangshi jiaodian yi an shuang cha* [Online Focus: Dual Investigations in One Case], *Radio Free Asia*, 6 February 2014 <http://www.rfa.org/mandarin/yataibaodao/meiti/aw-02062014151216.html>. On potential abuses, see also Wong, Gillian, ‘In China, Brutality Yields Confessions of Graft,’ *Associated Press*, 10 March 2014 at <http://www.bigstory.ap.org/article/china-brutality-yields-confessions-graft-1>.

<sup>102</sup> Statutes on Household Registration *Hukou dengji tiaoli* 户口登记条例 passed on 9 January 1958 by the NPC.

function of restricting freedom of movement; but due to this system, internal migrants are treated in some ways like illegal immigrants or as second-class citizens in the urban centres.<sup>103</sup> Since urban centres have created local rules of ‘immigration’ control,<sup>104</sup> most migrants are unable to change their household registration to an urban one, and consequently they have no or less easy access to public services including healthcare and education for their children, who are generally given the household registration of their parents.<sup>105</sup> As a result, they have to go to privately established schools for migrants, most of which are inferior to the state schools.<sup>106</sup> Even these inferior schools have on occasion been targeted by orders to close or simply by being demolished.<sup>107</sup>

Xu Zhiyong and Gongmeng had been leading efforts to provide legal aid to parents challenging the exclusion of their children from state schools for several years; they had established an informal network of parents supporting these efforts. With the initiation of the New Citizen Movement, their efforts became part of the movement. This included one occasion when some 100 family members of children denied access to state schools went to the ‘Letters and Visits’ office of the Ministry of Education in Beijing to submit a complaint about the relevant policies. While the authorities were later to claim that this activity had seriously disrupted ministry workers, the New Citizen Movement claimed that it had been conducted in a peaceful, non-disruptive manner.<sup>108</sup>

Both the campaign for equal education rights for migrant worker children and the campaign for asset disclosure were political and pedestrian at the same time. They made specific demands that could be expected to garner sympathy among large numbers of people: access to education for children and effective ways of combating corruption are popular concerns, in Chinese society certainly no less than in any other society. Transparent use of public funds, public scrutiny of power-holders susceptible to the temptations of corruption, and basic equality of access to public services are also vital to any decent political system; so these concerns connect to wider concerns about the functionality of the political-legal system. Soon, pictures of activists unfurling nearly identical banners in a variety of urban locations all over China were circulated, most importantly via the same social media, which were also used to organise such activities.<sup>109</sup>

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<sup>103</sup> Xuefei Ren, *Urban China* (Cambridge, Polity Books 2013), 51 ff. On legal and political advocacy against this system, see China Law Professor Blog (Donald C. Clarke), ‘The Famous Hukou Editorial’ (26 March 2010), available at <[http://lawprofessors.typepad.com/china\\_law\\_prof\\_blog/2010/03/the-famous-hukou-editorial.html](http://lawprofessors.typepad.com/china_law_prof_blog/2010/03/the-famous-hukou-editorial.html)> [last accessed 30 October 2016].

<sup>104</sup> A quota system was established by individual urban centers. Wang Fei-Ling describes a trend to abolish quotas in the period from 1997 to 2002 in Wang Fei-Ling, ‘Reformed Migration control and New Targeted people: China’s Hukou System in the 2000s’ (2004) *The China Quarterly* 115, 119.

<sup>105</sup> Charlotte Goodburn, ‘Educating Migrant Children: The effects of rural-urban migration on access to primary Education’ in S. Guo, & Y. Guo (eds), *Spotlight on China: Changes in Education under China's Market Economy* (Rotterdam, Sense Publishers 2015), available at [https://kclpure.kcl.ac.uk/portal/files/12725675/Charlotte\\_Goodburn\\_chapter\\_Educating\\_Migrant\\_Children\\_revised.pdf](https://kclpure.kcl.ac.uk/portal/files/12725675/Charlotte_Goodburn_chapter_Educating_Migrant_Children_revised.pdf).

<sup>106</sup> *Ibid* at p. 6.

<sup>107</sup> Zhao Han, ‘Rule Change Forces Migrants' Children out of Beijing for School’ (Caixin Magazine, 16 February 2015), available at <<http://english.caixin.com/2015-02-16/100784599.html>> [last accessed 30 October 2016].

<sup>108</sup> 张庆方律师：许志永案真相（修订版），17 July 2015, <http://xgmyd.com/archives/1378>.

<sup>109</sup> Pictures from various locations are provided in Citizen Special Issue, 公民专刊/ *Gongmin zhuankan*, no. 8 (2013).

In the South of China, similar initiatives emerged. Like Xu Zhiyong as co-initiator of the New Citizen Movement, so did Guo Feixiong also see the street movements emerging in the South as a next stage in advocacy and activism that had begun with work on individual cases.

‘We...organized a signature campaign to demand that the National People’s Congress ratify the UN Covenant on Civil and Political Rights (ICCPR). We coordinated small-scale street protests in eight cities in support of ICCPR and the government’s anti-corruption policy. Both actions were part of our strategy to promote the drafting of sound laws and the abolition of harmful ones. This activity was *a significant step forward* in pressing against government red lines and in addressing universal values in civic action—*not just protesting individual grievances*.’<sup>110</sup> (Emphasis added)

Some argued that the Southern Street Movement differed in certain respects from the New Citizen Movement. They thought that it was possibly even further-reaching or (in the eyes of the government) more directly politically provocative.

‘The New Citizen Movement mostly raises issues like equal education rights and financial disclosure: this does not touch so much on the system and is still more moderate. Whereas actions here in the streets in the South address more directly the central problems of the system, for example, by requesting that the State ratify the ICCPR.’<sup>111</sup> And, many of the slogans here are about democracy and constitutionalism and so on. They are more direct.’<sup>112</sup>

Some also felt that political debates amongst human rights defenders in the South were more likely to address the question if nonviolent resistance could be successful in China’s repressive political environment. The New Citizen Movement took a clear stance against violence, whereas some within the Southern Street Movement were in theoretical support of violent resistance, even though, for strategic reasons, no one supported violent action at this particular time.<sup>113</sup>

As these – at the time - novel debates and initiatives unfolded during 2013, a rights lawyer close to these developments commented that

‘There was a sense - I felt there was some loss of control; because the people who participated all had their own preferences, and they were getting so enthusiastic...’<sup>114</sup>

Predictably, these activities were interpreted as unacceptable challenges to the Party-State order and soon triggered measures to stop and punish the initiators. Lawyers, writers, activists and entrepreneurs were detained on various charges including ‘creating a social disturbance,’ illegal

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<sup>110</sup> <sup>110</sup> Guo Feixiong, ‘The Sovereignty of the People: My Conviction and my Dream,’ translated by Louisa Chiang and Perry Link, *ChinaChange*, 28 November 2014, <http://chinachange.org/2014/11/28/the-sovereignty-of-the-people-my-conviction-and-my-dream/>.

<sup>111</sup> Yang Ming (杨明), ‘公民权利无保障 连署促批准人权公约 / Gongmin quanli wu baozhang, lianshu zu pizhun renquan gongyue [Civil rights lack protection, urging the ratification of the ICCPR],’ 3 May 2013 at <http://www.voachinese.com/content/china-human-right-20130305/1615327.html>.

<sup>112</sup> #88 2013-1. In the Statement, *supra*, Guo states that Chinese civil society is in need of an opposition party, but does not discuss how it could be created.

<sup>113</sup> Discussed in Pils 2014, *Advocacy and Resistance*, Chapter 7.

<sup>114</sup> #19 2013-1.

assembly and ‘gathering a crowd to disrupt order in a public place.’<sup>115</sup> Some of them were released after a while; others including Ding Jiaxi 丁家喜, Xu Zhiyong and Zhao Changqing 赵常青 were convicted and sentenced to prison. It appears that the authorities targeted all those who had participated in an initial meeting in early May 2012, including lawyers, scholars and other advocates. The authorities also detained and charged those who had engaged in advocacy in the South, including Guo Feixiong 郭飞雄 (Yang Maodong 杨茂东), a scholar and rights defender of many years’ experience who had previously gone to prison, *inter alia*, for supporting Lawyer Gao Zhisheng, and other figures in the Southern Street Movement.

Such actions had been anticipated at least by some of the initiators; and it was possible for the movement to react, for instance by the release of a short video-clip showing the detained Xu Zhiyong defiantly reiterating his support for the New Citizen Movement.<sup>116</sup> The criminal trials of Xu Zhiyong and other New Citizen Movement participants held in January and February 2014, reinforced this message: Xu’s and other New Citizen Movement defendants’ lawyers largely remained silent or got their clients to ‘dismiss’ them, the lawyers, at the beginning of the trial, in protest against its unfairness.<sup>117</sup> They were more effective this way, even though they knowingly incurred risks, than if they had participated in a trial process which, to use the language of the lawyer’s comment quoted earlier, they regarded as mere ‘theatre.’ In a final statement to be read out at trial, Xu Zhiyong himself reiterated the principles of the movement he had co-initiated, and added an emotional plea.

‘When hopes of reform are dashed, people will rise up and seek revolution. The privileged and powerful have long transferred their children and wealth overseas; they couldn’t care less of the misfortune and suffering of the disempowered, nor do they care about China’s future. But we do. Someone has to care. Peaceful transition to democracy and constitutionalism is the only path the Chinese nation has to a beautiful future. We lost this opportunity a hundred years ago, and we cannot afford to miss it again today.’<sup>118</sup>

The fact that the court prevented him from reading his statement out in full underlined official anxieties about the civic challenge he spoke of, as well a bureaucratic desire to remain in control. Xu’s speech was circulated in print and included in a collection of his works that was translated into English.<sup>119</sup>

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<sup>115</sup> China Human Rights Defenders (CHRD), ‘Individuals Unlawfully Detained in Crackdown on Peaceful Assembly, Association & Expression,’ updated 16 October 2013 at <http://chrdnet.com/2013/07/individuals-detained-in-crackdown-on-assembly-and-association/> lists over 60 individuals affected.

<sup>116</sup> In the video-clip, Xu Zhiyong says, amongst other things, that his only crimes were calling on everyone to be a citizen, a forthright citizen who exercises their civil rights guaranteed under the Constitution and fulfils a citizen’s civic duty, advocating for equal rights to education...and asset disclosure by public officials.’ Chin 2013.

<sup>117</sup> Jacobs, Andrew, ‘Chinese Activist’s Lawyers Call His Trial Unfair,’ *The New York Times*, 22 January 2014 at <http://www.nytimes.com/2014/01/23/world/asia/chinese-activist.html>; Kaiman, Jonathan, ‘Xu Zhiyong trial: reaction of Chinese officials has unexpected impact,’ *The Guardian*, 22 January 2014 at <http://www.theguardian.com/world/2014/jan/22/xu-zhiyong-trial-china-official-reaction-new-citizens-movement>.

<sup>118</sup> Xu Zhiyong 2014b, ‘For Freedom, Justice and Love — My Closing Statement to the Court,’ translated anonymously, 22 January 2014, *ChinaChange*, <http://chinachange.org/2014/01/23/for-freedom-justice-and-love-my-closing-statement-to-the-court/>.

<sup>119</sup> Xu Zhiyong, *To Build a Free China: A Citizen’s Journey*, translated by Joshua Rosenzweig and Yaxue Cao, Boulder, Lynne Rienner Publishers, 2017, pp. 267-82. See also Ian Johnson, ‘When the Law Meets the Party,’ *New York Review of Books*, 17 August 2017.



At his trial in Guangzhou in November 2014, the southern rights defender Guo Feixiong recalled the history of democracy protests since the mid-1980s. He said that the current movement had matured from the setback of 1989. His account of his own experience at the hands of the authorities, of interrogations and extremely brutal torture, as well as long hunger strikes, was also an account of survival, recovery and continuity,<sup>120</sup> sublimated as a belief in continued struggle.<sup>121</sup>

‘Our dream, passed from generation to generation among activists, to see “the prisons overloaded with conscientious objectors,” is nearing realization. Our faith is that totalitarianism, which negates so completely the humanity in its minions, will one day be driven from the earth.’<sup>122</sup>

The emergence of the New Citizen Movement and its southern counterparts show how in China’s conflicted and hybrid system, a system that combines liberal and authoritarian elements, their principled opposition to authoritarian practices could drive a growing number of legal advocates into political opposition. The evolution of these movements also reflect the maturing of rights advocacy from work on individual cases and more specific causes to work on the broader, more abstract and ambitious goal of system transition to constitutional democracy and rule of law. The incarceration of some of the main protagonists of these initiatives was expected, accepted as a consequence of advocacy, and – as Xu’s and Guo’s concluding statements illustrated -- integrated into the initiative’s cause. When they went to prison, the structures of communication and coordinated action Xu, Guo and others had helped create remained active. Their concluding statements and many other messages of a similar nature could continue to be disseminated, and late as in April 2016 rights defenders referred to ‘same city citizen meals’ still being held in China.<sup>123</sup>

In the face of widespread criticism of these verdicts and the wider crackdown, the Party-State media insisted that the criminal justice process had been lawful and the verdict just. The following statement captures the positivistic tone of these messages. It insists that the law has been followed in Xu’s case and that no political or legal judgement has been passed.

‘The 1<sup>st</sup> instance decision of the Beijing Intermediate Court was made in accordance with the current law and exhibited a firm and resolute attitude. This decision was neither about Xu Zhiyong’s morals [*daode*] or personal fibre [*renpin*]; nor was it to determine the nature of the slogans he shouted. It was merely an authoritative decision about where the legal boundaries lay, and about how far Xu Zhiyong had transgressed these boundaries.

We believe that Chinese society truly needs such decisions, indeed, that it urgently needs them. While some people just are not very clear about what constitutes lawful, unlawful or indeed criminal conduct in areas that concern politics, a minority of

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<sup>120</sup> Guo Feixiong, ‘The Sovereignty of the People: My Conviction and my Dream,’ translated by Louisa Chiang and Perry Link, *ChinaChange*, 28 November 2014, <http://chinachange.org/2014/11/28/the-sovereignty-of-the-people-my-conviction-and-my-dream/>.

<sup>121</sup> According to his friends, Guo had tried to avoid becoming an indispensable leader, arguing that the more dispensable he was to his supporters, the safer he would be anyway. Conversation #88-13-5.

<sup>122</sup> *Ibid.*

<sup>123</sup> Conversation #139--16-1.

people love engaging in risky actions and taking their chances on whether the law will impose sanctions on their conduct.’<sup>124</sup>

It should be noted that Xu Zhiyong revealed later that he was, in fact, tortured with cigarette butts and sleep deprivation during the initial months of his pre-trial detention – that in this and other respects, the law had not been followed in his case.<sup>125</sup> Guo Feixiong appears to have suffered even worse treatment – not only in pre-trial detention but also while serving his prison term.<sup>126</sup> No country ‘urgently needs’ criminal processes such as those these two rights defenders had to go through.

Yet, this sparse, carefully worded comment stands in clear contrast to the commentary the Party-State and its controlled media produced in later cases in the Xi Jinping era. Xu and Guo had been placed under pre-trial detention in the spring and summer of 2013, i.e. in the early months of Xi Jinping’s leadership, when it was only just beginning to reveal its contours. It was only later that the system began to control and repress human rights defenders and wider civil society in unprecedented ways. The China Xu was ‘released’ back into at the conclusion of his prison term in July 2017 was already a different place from the one he had been detained in, as discussed in the following section.<sup>127</sup>

## V. Lawyers in civic opposition since the clampdown on the New Citizen Movement

Changes signalling a more explicit and unambiguous rejection of the values rights lawyers and their movements had sought to defend under Xi Jinping’s leadership began in 2013, the year of the clampdown on the New Citizen Movement and the Southern Street. In the month of Xu Zhiyong’s formal criminal detention, a document known as ‘Document No 9’ revealed the Party-State’s intention to stop the discussion of ‘so-called “universal values”’ in places of learning.<sup>128</sup> In 2014, the Party at its 4<sup>th</sup> Plenary Meeting announced that Party leadership and socialist rule of law with Chinese characteristics were ‘identical.’<sup>129</sup> In 2015, the Party-State made laws and issues Party rules that gave effect to the re-organisation of ‘social organisations’ on corporatist

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<sup>124</sup> Op-ed (社评), ‘许志永判 4 年，法律明确态度和尺度 [Xu Zhiyong sentenced to four years, a clarification of the law’s stance and criteria],’ *Global Times*, 27 January 2014, <http://opinion.huanqiu.com/editorial/2014-01/4793763.html>.

<sup>125</sup> Zhang Qingfang, ‘许志永案真相（修订版 [The truth about Xu Zhiyong’s case (amended version)],’ *China Change*, 17 July 2015, <http://xgmyd.com/archives/1378> | 新公民运动; Radio Free Asia, ‘不放弃自由公义爱！许志永出狱后接受港媒专访 [Not abandoning freedom, justice, love! Xu Zhiyong gives post-release interview to Hong Kong media],’ 11 August 2017, <http://www.rfa.org/mandarin/Xinwen/XQL-08112017032826.html>; Liu Yue (刘跃), ‘探访许志永博士小记 [Brief notes on visiting Dr Xu Zhiyong],’ *Boxun*, 15 August 2017, <https://peacehall.com/news/gb/pubvp/2017/08/201708151023.shtml#.WZWR9FGGOUk>.

<sup>126</sup> NCHRD, ‘Update to UN on case of Guo Feixiong – July 14, 2015,’ <https://www.nchrd.org/2015/08/update-to-un-on-case-of-guo-feixiong-july-14-2015/>.

<sup>127</sup> ChinaChange, ‘Xu Zhiyong Released from Prison,’ 15 July 2017, <https://chinachange.org/2017/07/15/new-citizens-movement-leader-xu-zhiyong-released-from-prison/>.

<sup>128</sup> ChinaFile, ‘Document No. 9’, available at <<http://www.chinafile.com/document-9-chinafile-translation>> [last accessed June 2016]; Mirrorbooks (明镜), ‘《明镜月刊》独家全文刊发中共 9 号文件 [“Mirrorbooks Monthly” exclusive, full text of CCP Document No. 9]’ (20 August 2013), available at <[http://www.molihua.org/2013/08/9\\_7925.html](http://www.molihua.org/2013/08/9_7925.html)>.

<sup>129</sup> <http://chinalawtranslate.com/fourth-plenum-decision/?lang=en>.

principles and harsh control of foreign civil society organisations operating in China.<sup>130</sup> It also created and revised national security related legislation reflecting clearly more authoritarian, if not neo-totalitarian, conceptions of law. For example, the 2015 National Security Law invoked ‘People’s Democratic Dictatorship’<sup>131</sup> as a guiding principle,<sup>132</sup> after decades of comparative reticence on the idea of ruling as a dictatorship against the enemies of the People.

With regard to the legal profession, these changes of norms and attitudes have manifested in two major ways. On the one hand, there was an attempt to recruit the legal profession for the purposes of the Party-State in legal dispute resolution.<sup>133</sup> For example, a November 2015 Party Political-Legal Committee ‘Opinion’ by the announced that in future licenced professional lawyers would be expected to work as helpers of the authorities, required to ‘volunteer’ their services to help the party state address mass grievances. They were to ‘help petitioners get a correct understanding of the opinions of the authorities regarding the lawful handling of the case’ or, in case the authorities had made a mistake, ‘make suggestions to the governmental and legal authorities,’ or help petitioners apply for relief and assistance.’<sup>134</sup> If successful, this measure of co-optation could gradually turn lawyers into functionaries of the Party-State. It could shift the lawyer’s responsibility: rather than being primarily responsible for the rights and interests of the clients, it seemed to create responsibility toward the government, and thus threatened to undermine their ability to engage in adversarial rights advocacy.

On the other hand, new rules and (as of this writing) draft rules were introduced to tighten the already existing limitations of independent legal advocacy even further, and to recruit law firms more clearly as collaborators in enforcing such limitations. A September 2016 Ministry of Justice Regulation on the Management of Law Firms, for example, imposed stringent requirements on Chinese law firms. They must ensure, *inter alia*, that their lawyers not

‘publish distorting or misleading information on cases handled by themselves or others, or maliciously hype up cases...put pressure on the authorities and attack legal authorities or undermine the legal system by setting up groups, producing joint letters, or by publishing open letters;’... [and that they not] humiliate, defame, threaten or beat judicial personnel or participants in a litigation, or engage in denial of the state-determined nature of an evil sect organisation or other conduct seriously disrupting court order [or] publish or disseminate speech that denies the political order laid down in the Constitution, denies

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<sup>130</sup> Orville Schell, ‘Crackdown in China: Worse and Worse,’ *New York Review of Books* / China File, 6 April 2016, <https://www.chinafile.com/nyrb-china-archive/crackdown-china-worse-and-worse>.

<sup>131</sup> 人民民主专政 -- The CPC and state represent and act on behalf of the people, but may use dictatorial powers against reactionary forces. In Chinese, the word used for ‘dictatorship’ (专政) does not have clearly negative connotations, unlike dictator 独裁(者) or hegemon 霸王.

<sup>132</sup> Article 2 of 中华人民共和国国家安全法[National Security Law of the People's Republic of China], passed on July 1, 2015 at the 15th meeting of the Standing Committee of the 12th National People's Congress.

<sup>133</sup> One might argue that this continued a trend of weakening adjudicative dispute resolution mechanisms begun earlier. Carl F. Minzner, ‘China’s Turn Against Law,’ *59 American Journal of Comparative Law* (2011) 935.

<sup>134</sup> Party Central Political Legal Committee Opinion on Establishing A System for Lawyers to Participate in Resolving and Acting as Legal Representatives in Litigation-Related Petitioning Cases (Trial Version) [中央政法委《关于建立律师参与化解和代理涉法涉诉信访案件制度的意见(试行)》], 10 November 2015, published at MoJ webpage [http://www.moj.gov.cn/index/content/2015-11/10/content\\_6348175.htm?node=7337](http://www.moj.gov.cn/index/content/2015-11/10/content_6348175.htm?node=7337). The document goes on to affirm that lawyers must respect the principles of (1) voluntariness (petitioners’ wishes must be respected, no one must be forced to resolve [their grievance], no favouritism toward the governmental-legal authorities; no misleading of petitioners); (2) legality; (3) seeking truth from facts; (4) pro bono provision of services – no compensation for the lawyers.

fundamental principles or endangers national security, or use the internet or the media to stoke discontent toward the Party and Government.’<sup>135</sup>

As especially the last quoted phrase shows, law firms are essentially placed under obligation to ensure that their staff politically censor themselves. Noncompliance, according to Article 26 of the Regulation, puts the firms’ continued registration and hence their very existence at risk.

These two trends of eliminating rights lawyers and remodelling other lawyers correspond to a reconceptualization of law along more authoritarian, if not neo-totalitarian or totalist, lines in the Xi era. According to Carl Schmitt’s concept of the political and his idea of the ‘total state,’ the very idea of the political requires the identification of enemies; and ‘the political’ has primacy in all legal orders regardless of their specific design and institutions.<sup>136</sup> This approach supports an understanding of the institutions of the ‘law’ as first and foremost projecting the power of the state, not its limitation by law.<sup>137</sup>

It is against this wider background that we must understand the crackdown on human rights lawyers and lay human rights defenders that followed the rise and repression of the New Citizen and Southern Street Movements. The so-called ‘709 Crackdown’ began with the detention of Lawyers Wang Yu and Bao Longjun and their sixteen year old son, Bao Zhuoxuan, in the night of 9 July 2015.<sup>138</sup> Nearly simultaneously, the authorities also took away rights lawyers and assistants connected to Fengrui Law Firm, rights lawyer Li Heping and his colleagues and brother; and activist Hu Shigen and his supporters.

Soon, it became clear that the 709 Crackdown was different from earlier ones, not only in terms of its scope but also in terms of its claimed justification, purpose, and specific methods. For one thing, the authorities had no hesitation in directly threatening prosecution for the mere act of taking up legal representation of, or engaging in advocacy for, a professional rights lawyer colleague, and demanding written guarantees of not engaging in any advocacy of this kind. One lawyer, who was ‘caught’ when getting off a train and interrogated by domestic security police from his hometown, was warned that he would not be allowed to provide criminal defence to fellow lawyers detained in the course of the crackdown. Otherwise, the police told him, he would be regarded as a ‘co-suspect.’<sup>139</sup> In addition to the main targets, who were detained, In addition, hundreds of lawyers and supporters were subjected to brief detentions or coerced ‘chats.’<sup>140</sup> The authorities released most of the lawyers held or informally ‘invited to chats’ after a few hours or days.<sup>141</sup>

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<sup>135</sup> 律师事务所管理办法[Regulation on the Management of Law Firms], promulgated by edict 133 / 2016 of the Ministry of Justice on 6 September 2016, available at [http://www.gov.cn/gongbao/content/2016/content\\_5109321.htm](http://www.gov.cn/gongbao/content/2016/content_5109321.htm).

<sup>136</sup> Carl Schmitt, 1922 (2005). *Political Theology: Four Chapters on the Concept of Sovereignty*. George Schwab (translation). Chicago: University of Chicago, p.5.

<sup>137</sup> On recent Carl Schmitt reception in China, see also Karl Marchal and Carl K.Y. Shaw (editors), *Carl Schmitt and Leo Strauss in the Chinese-speaking World: Reorienting the Political*, Lexington Books, 2017; Flora Sapio, ‘Carl Schmitt in China,’ *The China Story* blog, 7 October 2015, <https://www.thechinastory.org/2015/10/carl-schmitt-in-china/>; Jean-Christopher Mittelstaedt, ‘Understanding China’s Two Constitutions: Re-assessing the role of the Chinese Communist Party.’ [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2682609](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2682609).

<sup>138</sup> ‘709’ thus refers to the date when the crackdown began.

<sup>139</sup> Conversation #137-16-1. Similar: e.g. conversations #121-16-1; #138-16-1.

<sup>140</sup> [China Human Rights Lawyers Concern Group \(CHRLCG\)](#) and [Chinese Human Rights Defenders \(CHRD\)](#)

<sup>141</sup> Among some twenty-five human rights lawyers sought out for (anonymous) conversations about 7-09 in 2016 and 2017, only one had thus far entirely avoided the coerced ‘chat.’ Two had undergone detention and torture.

Second, from the first days of the crackdown, the authorities engaged in intense efforts to publicise what they were doing and to vilify the victims of their persecution. Within days from the first detentions, newspapers and national Chinese television carried elaborate, lengthy reports on the detainees, described, *inter alia*, as part of a “‘rights defence” ring.”<sup>142</sup> In August 2016, some lawyers and their co-workers were subjected to ‘televised trials,’ during which they made even more elaborate statements of submission to the authority of the Party-State; others were forced to give ‘interviews’ to the media.

For example, lawyer Zhou Shifeng was shown on television on the occasion of his subversion trial in August 2016. According to official reports of his and some of his colleagues’ trials, supplemented by purported trial ‘transcripts,’<sup>143</sup> it was stated that the accused had ‘used a law firm as a platform to hype up key cases and incidents, and carrying out activities to subvert state power,’ and that together with others, he had ‘put forward systematic ideas, methods, and measures for the subversion of state power.’<sup>144</sup> About to be convicted and sent to prison for seven years, Zhou Shifeng not only admitted guilt. He also spoke of his deep gratitude toward the Party-State – the very authorities that had publicly broadcast his statement of repentance shortly after his initial detention<sup>145</sup> and held him *incommunicado* for over a year.

‘Esteemed Presiding Judge, judges, state prosecutors and my two esteemed defence lawyers: you have all been put to so much trouble! Through today’s trial, I have come to realise fully what crimes I have committed, and the harm my actions have caused to the Party and the Government. I hereby express my deepest repentance toward our government! [*Bows.*] I trust that a trial so replete with fairness and justice and the rule of law as this will result in a fair verdict, and that it shall stand the test of history and legal scrutiny. I admit guilt and repent, admit guilt and subject myself to the law; and I will never appeal!’<sup>146</sup> ... I thank the court! I thank the prosecutor! I thank my lawyers!’<sup>147</sup>

It is difficult not to speculate that the implausible obsequiousness of these remarks might have been meant to send a message to his supporters. His mention of ‘the Party and State’ and his

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<sup>142</sup> For example, Cao Yin, ‘Lawyers “tried to influence verdicts”,’ 13 July 2015, <[http://www.chinadaily.com.cn/china/2015-07/13/content\\_21255261.htm](http://www.chinadaily.com.cn/china/2015-07/13/content_21255261.htm)>; ‘贵圈真乱--- 一图读懂“维权”圈 [Your Circle is a Real Mess – A graphic explaining the “Rights Defence” Ring],’ *Legal Daily* (法制日报), 13 July 2015, [http://www.legaldaily.com.cn/zt/content/2015-07/13/content\\_6168094.htm?node=73108](http://www.legaldaily.com.cn/zt/content/2015-07/13/content_6168094.htm?node=73108); translated and annotated at ChinaLawTranslate, <<http://chinalawtranslate.com/lawyer-cases-infographic/?tpedit=1&lang=en>>.

<sup>143</sup> Transmitted by social media, on file with author.

<sup>144</sup> Human Rights in China (HRiC), ‘Annotated Excerpts from Hu Shigen and Zhou Shifeng’s Trial Transcripts,’ 12 August 2016, <http://www.hrichina.org/en/annotated-excerpts-hu-shigen-and-zhou-shifengs-trial-transcripts>. Lawyer Li Heping was accused of ‘using funding from a certain foreign NGOs to engage in activities to subvert state power,’ Zhai Yanmin of ‘unlawful organizing petitioners to make unruly petitions and to stir up trouble in order to carry out activities to subvert state power.’. Gou Hongguo (who was convicted and, like Zhai, given a suspended sentence) is also mentioned in this outline.

<sup>145</sup> Vivienne Zeng, ‘Human rights lawyers targeted in unprecedented crackdown,’ *Hong Kong Free Press*, 13 July 2015, <<https://www.hongkongfp.com/2015/07/13/human-rights-lawyers-targeted-in-unprecedented-crackdown/>>.

<sup>146</sup> Xinhua Net, ‘周世锋涉嫌颠覆国家政权案一审开庭 当庭承认犯罪事实 [1<sup>st</sup> Instance Trial of Zhou Shifeng – Admits facts of the crime in court],’ 4 August 2016, <<http://www.chinanews.com/sh/2016/08-04/7961539.shtml>>.

<sup>147</sup> Translation has made use of Chinese-English excerpt available at Human Rights in China (HRiC), ‘Annotated Excerpts from Hu Shigen and Zhou Shifeng’s Trial Transcripts,’ 12 August 2016, <http://www.hrichina.org/en/annotated-excerpts-hu-shigen-and-zhou-shifengs-trial-transcripts>.



expression of gratitude toward his lawyers after the other participants in the trial certainly reflected the hierarchies underlying such a ‘politically sensitive’ trial.

But we cannot tell if sarcasm was Zhou’s intention, because as in other ‘709’ crackdown cases, the authorities had taken far too good care to ensure that he would not be able to speak independently to anyone who might transmit a genuine message, from the moment he was first detained. For the first six months, he was placed under ‘residential surveillance in a designated location,’ a measure available in state security crimes cases, ensuring he was completely without access to legal counsel. The authorities also ensured that Zhou ‘represented’ by a lawyer the authorities had chosen (or in his case, suggested to the family) and that there was therefore no access to him right until trial. For the trial, they ensured that his family would not attend, by procuring a note, handwritten by Zhou, stating that he did not wish his family to attend – because ‘they are all peasants with low educational attainment and...it would not be good for me or them.’<sup>148</sup> While no independent accounts of the process Zhou’s trial are available, the author received a detailed account of how carefully another trial was negotiated, scripted and, indeed, rehearsed in one of the other 709 Crackdown cases;<sup>149</sup> and available film footage of the trial seems consistent with the assessment that it was scripted.<sup>150</sup>

Zhou’s was not the only case of such startling shows of self-humiliation. His former employee Wang Yu, to give one other example, also after being detained for over a year detained without access to independent counsel ‘on suspicion of state subversion,’ was put on display on the occasion of her purported ‘release on bail’ on 1 August 2016. Speaking in what appeared to be a holiday resort, she spoke to reporters filming her, renouncing her former advocacy, denouncing two foreign organisations<sup>151</sup> for human rights awards given to her earlier that year, and, like Zhou, thanking and praising the authorities. The effects of these displays were further amplified by accompanying articles in the official news media, as well as further audio-visual materials. For example, officially circulated video-clips cast human rights advocates as enemies, visually associating them with images of U.S. warfare and portraying Chinese human rights advocates as part of a U.S. based plot to subvert China.<sup>152</sup>

It was only some months later, in January 2017, that it became possible to confirm some of the facts explaining the 709 Crackdown victims’ strange and unsettling collaboration with the authorities in the criminal process. In late January 2017 Lawyer Li Chunfu, held since September 2015, was released from over 500 days of incommunicado detention with signs of serious mental

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<sup>148</sup> Handwritten letter by Zhou Shifeng 天津二中院：周世锋向法院书面请求不希望亲友旁听庭审，

<http://legal.people.com.cn/n1/2016/0803/c42510-28608968.html> and

<https://botanwang.com/articles/201608/%E5%A4%A9%E6%B4%A5%E4%BA%8C%E4%B8%AD%E9%99%A2%E5%BC%9A%E5%91%A8%E4%B8%96%E9%94%8B%E4%B8%8D%E5%B8%8C%E6%9C%9B%E4%BA%B2%E5%8F%8B%E6%97%81%E5%90%AC%E5%BA%AD%E5%AE%A1.html>. In another case, the author

learned that the 709 target had been explicitly requested to ‘de-invite’ their family.

<sup>149</sup> #300-17-1.

<sup>150</sup> See also Jun Mai, ‘How Chinese rights lawyer’s courtroom mea culpa went off script,’ *South China Morning Post*, 22 August 2016, <http://www.scmp.com/news/china/policies-politics/article/2006700/how-chinese-rights-lawyers-courtroom-mea-culpa-went>: ‘In a 10-minute final statement, the Peking University law school master’s degree holder praised China’s legal system, saying it was “so much beyond the Western rule of law”, and that the trial would “stand the test of the world”. The praise was not included in the official transcript published hours later.’

<sup>151</sup> Namely, the American Bar Association and the Ludovic Trarieux Human Rights Prize Committee.

<sup>152</sup> 颜色革命 Color Revolution, available at <<https://www.youtube.com/watch?v=8qBt-i9ErSY>> [last accessed 7 November 2016], English translation available at <<http://chinadigitaltimes.net/2016/08/hk-activist-branded-us-backed-separatist-govt-video/>> [last accessed 7 November 2016].

illness.<sup>153</sup> A few days later, Lawyer Xie Yang, finally able to meet his defence lawyer, provided a detailed account of his torture to the lawyer, who decided to publish the news.<sup>154</sup> In July 2017, Lawyer Wang Yu released a statement in which she described how she had been kept confined in a small box, deprived of food, and tormented in various other ways during her detention.<sup>155</sup> By July 2017, it had emerged that some six detainees claimed to have been forcibly drugged. One of them commented in a conversation in July 2017 that

‘It made you think you were finished this time. Mentally, it was [the scariest], because you couldn’t know [what you’d been given] and so you thought, for sure they want to kill you. You won’t get out of here alive.

It was only in there that I understood what torture was. Whatever we’d been imagining before got nowhere near what it was like.’<sup>156</sup>

These revelations suddenly seemed to explain a lot. It was no longer hard to understand why, unlike earlier persecuted rights defenders and dissidents, several of these latest victims had co-operated so much with the authorities, once it was understood that forced drugging had been added to the usual torture methods and that by this means, the authorities had been able directly to affect their prisoners’ minds.

The contrast between the 7-09 detainees’ experience, their public displays showing the former rights advocates entirely subdued, and the earlier trials of Xu Zhiyong, Guo Feixiong, et al, is significant in several respects. While Xu and Guo and their loved ones were subjected to unjust ordeals at the hands of the authorities, and despite the systematic efforts of the authorities to destroy the initiatives they had stated, they had at the point of their trials managed to preserve their dignity, sanity, and sense of purpose; and they had maintained channels of communication with a wider public through their criminal defence lawyers and their trials. In their concluding statements, they were able to state their goals and their resolve to continue their advocacy once released, and to integrate their incarceration into a biography of legal-political activism which, at least according to their own public statements, made some sense to them.

Moreover, in the cases of Xu and Guo and other defenders tried and punished in the context of the New Citizen Movement and Southern Street Movement, their public *personae* as advocates for a more liberal China had not been destroyed. One might even argue that their profiles had in some ways been enhanced by what was done to them, as well illustrated by Xu

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<sup>153</sup> Wang Qiaoling, ‘Chinese Rights Lawyer Li Chunfu Mentally Disturbed and Physically Ruined After Abuse in Custody,’ translated by Cao Yaxue, *ChinaChange*, 13 January 2017, available at <https://chinachange.org/2017/01/13/chinese-rights-lawyer-li-chunfu-mentally-disturbed-and-physically-ruined-after-abuse-in-custody/>.

<sup>154</sup> Xie Yang and Chen Jiangang, ‘Transcript of Interviews with Lawyer Xie Yang (3) – Dangling Chair, Beating, Threatening Lives of Loved Ones, and Framing Others,’ translated by Cao Yaxue, *ChinaChange*, 21 January 2017, <<https://chinachange.org/2017/01/21/transcript-of-interviews-with-lawyer-xie-yang-3-dangling-chair-beating-threatening-lives-of-loved-ones-and-framing-others/>>.

<sup>155</sup> Wang Yu, ‘王宇、包龙军：致敬！“709”案辩护人 [Wang Yu, Bao Longjun: Saluting the “709” criminal defenders!],’ *Botan Web*, 12 July 2017, <<https://botanwang.com/articles/201707/%E7%8E%8B%E5%AE%87%E6%9B%9D%E5%85%89%E9%85%B7%E5%88%91%E3%80%80%E6%84%9F%E8%B0%A2%E5%85%B3%E6%B3%A8%E4%BF%83%E5%A4%84%E5%A2%83%E6%94%B9%E5%96%84.html>>.

<sup>156</sup> Eva Pils, ‘A new torture in China,’ *CPI Analysis guest blog*, 10 August 2017, <<https://cpianalysis.org/2017/08/10/a-new-torture-in-china/>>.

Zhiyong's release of a video-clip from pre-trial detention, and Xu's and Guo's remarkable trial statements, discussed earlier on. They clearly envisaged coming out of prison in a state that would allow them to continue their work and self-defined mission. The same was not true, by all available accounts and information, of any of the detainees affected by the '7-09' crackdown. The attacks on the 7-09 detainees' mental, as well as physical integrity was instead further amplified by the way its results were broadcast and advertised to the entire nation and even abroad. An interlocutor commented in April 2016 (after numerous reports had appeared, but before the August 2016 trials),

'[These reports] have in the eyes of many [rights lawyers] done the worst harm to us, because many ordinary people will be inclined to trust these official reports. They might have come across some positive information about rights lawyers; but after these detentions, they will be informed that these lawyers were working in their own interest, to earn foreign money, and that this entire circle has actually been doing these things under the direction of foreign anti-China enemy forces.'<sup>157</sup>

Looking back to the 'New Citizen Movement,' 'Southern Street Movement,' and similar groups and initiatives from the vantage point of 2017, is in some ways easy to gauge how it will be possible for people in China to choose to 'be a citizen' (*zuo gongmin*, 做公民)<sup>158</sup> in the Xi Jinping era. This was a demanding and dangerous choice even in the years 2012-13; it has clearly become even more difficult since then.

Yet, there is evidence that even in the face of the unprecedented '709 Crackdown,' the extant community of human rights lawyers and lay human rights defenders has rallied and continued to operate, and that social networks, once created, are hard to destroy completely. In the context of '709,' having been forced to 'promise' not to take on the cases of fellow rights lawyers; not to communicate about these cases via the social media; and not to take media interviews about them, they nevertheless went on to organize support for their detained colleagues. For example, the more well-known among the rights lawyers successfully recruited lawyers not yet known to the authorities to take on the criminal defence of their incarcerated colleagues;<sup>159</sup> and after the accounts of Lawyer Xie Yang's torture were disclosed, dozens of lawyers and other supporters came forward with pictures of themselves bearing messages of opposition to torture, and support for Xie Yang and other lawyers.<sup>160</sup> Rights lawyers have also largely maintained their social media communication structures such as chat-groups; and activities directly targeted by the crackdown, such as workshops on sensitive issues, continue to be held;<sup>161</sup> and in some cases, spouses of the '709' detainees transformed themselves into resourceful advocates not only of these, but increasingly also of other cases.<sup>162</sup> In the context of

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<sup>157</sup> Conversation #124-16-1

<sup>158</sup> A collection of Xu Zhiyong's work, in Chinese entitled *Being a True Citizen*, in translation is available as Xu Zhiyong, *To Build a Free China: A Citizen's Journey*, translated by Joshua Rosenzweig and Yaxue Cao, Boulder, Lynne Rienner Publishers, 2017.

<sup>159</sup> Conversations # 128-16-1; 130-16-1

<sup>160</sup> Pictures from the social media, on file with author.

<sup>161</sup> Conversations #124-16-1; 125-16-1

<sup>162</sup> Catherine Lai, 'Reluctant human rights defenders: The wives of those detained in China's lawyer crackdown,' *Hong Kong Free Press*, 9 July 2015, <<https://www.hongkongfp.com/2016/07/09/reluctant-human-rights-defenders-the-wives-of-those-detained-in-chinas-lawyer-crackdown/>>; • Alex W. Palmer, 'Flee at once: China's besieged

the New Citizen Movement, the website that was created as a platform for contributions from members and sympathizers has continued to post analysis and commentary until the time of this writing. Its title page continues to display Xu Zhiyong's appeal.

'Citizens, let us begin right now. No matter where you are, what your profession is, and whether you are poor or rich, let us all from the bottom of our hearts, in our real lives, on the internet and on every inch of Chinese soil firmly and proudly proclaim the status that has been ours all along: I am a citizen, we are citizens.'<sup>163</sup>

## Conclusion

This article has analysed changes in rights lawyer advocacy over the past two decades. Focussing on the transmutations of lawyer-driven human rights advocacy from the Sun Zhigang case to the organisation Gongmeng and the New Citizen Movement, it has shown how advocacy has evolved from largely case-focused to more cause-focused and, ultimately, wider political human rights advocacy, and how this has triggered further political-legal consequences. The discussion here urges two major conclusions. First, the experience of human rights lawyers and human rights defenders more widely calls into question the incrementalist top-down reform paradigm long dominant in China law scholarship. This is not only because the lawyers whose experience and voice have chiefly contributed to this article have found institutional spaces for legal advocacy shrinking; because they have reported few successes; and much of their work has ended in failure, on the terms of the institutions of the legal system. The severe repression of the NGO *Gongmeng* was discussed as one among several emblematic examples of the precariousness of rights advocacy throughout the past fifteen years. More clearly and momentarily, incrementalist reform expectations have been crushed by the developments of the Xi Jinping era, in particular, the reconceptualization of law on explicitly anti-liberal terms, with severe implications for any further engagement in human rights advocacy.

Second, these – from the perspective of human rights advocates – disappointing institutional changes have shifted the focus of advocacy to bottom-up civic initiatives for political change that would have to happen, to allow for rule of law to be adequately safeguarded. It led to new civic lawyer associations' increasingly explicit rejection of the existing, fixed, corporatist, and inert Party-State-provided organizational structures. The trajectory from *Gongmeng*, as a legal advocacy NGO, to the 'New Citizen Movement' has been used as a particularly important, albeit not the only example illustrating this trend toward more explicitly political demands as a result of years of suppression of *weiquan* demands and repression of rights defenders.

The Party-State is not only absent from these new associative structures, which can be characterised as responses to institutional dysfunction within the Party-State, but clearly opposed to them, as those who build such structures are well aware. The exercise of rights of expression and association can strengthen a popular sense of these rights and associated civic values, even where such rights are severely curtailed and where their exercise is repressed. Citizens' presence

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human rights lawyers,' New York Times Magazine, 25 July 2017.

<<https://www.nytimes.com/2017/07/25/magazine/the-lonely-crusade-of-chinas-human-rights-lawyers.html>>.

<sup>163</sup> Xu 2014a. This quotation heads every news round-mail from a Google group named 新公民论坛, 公民志愿者/*Xin gongmin luntan, gongmin zhiyuanzhe* [New Citizen Forum, Citizen Volunteers].

and voice, civic rights advocacy outside of the institutions, channels and mechanisms has risen steadily since the beginning of the human rights movement, and in China (at least) as much as elsewhere, human rights is ‘a driver language behind values triggering political change,’<sup>164</sup> in Ignatieff’s words, or at least a driver language demanding such change.

The trajectory described here is thus also one from legal to political action, and from intra-institutional advocacy to resistance against the institutions of the system. It shows how important the exercise of expression rights in an environment hostile to the very idea of free political expression is, and it illustrates the deep connection between freedom of speech and the right of resistance, as the most central case of a right that cannot be understood on positivistic, authority-dependent terms. The model for citizen action which the New Citizen Movement represented might survive crackdowns better than more traditionally organized and visible movements. Together with other, similar and connected initiatives, these initiatives has helped crystallize a political momentum; it has created virtual-space networks that persist and can be revitalized for new advocacy purposes, even at times of democratic decline and authoritarian resurgence.

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<sup>164</sup> Michael Ignatieff, intervention at King’s College London, Yeoh Tiong Lay Centre, 28 October 2016.